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## **An Agricultural Law Research Article**

# **The Clinton Wetlands Plan: No Net Gain in Wetlands Protection**

by

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THE CLINTON WETLANDS PLAN: NO NET GAIN  
IN WETLANDS PROTECTION

MICHAEL C. BLUMM\*

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I. INTRODUCTION

With considerable fanfare and much national press attention, the Clinton Administration, on August 24, 1993, unveiled its "fair, flexible, and effective approach" to wetlands protection.<sup>1</sup> Protecting wetlands has long been among the most contentious of national environmental issues, in part because it is accomplished chiefly through a federal regulatory program that for twenty years has been

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\* Professor of Law, Northwestern School of Lewis and Clark College. This article is based on a speech delivered as the 1994 Distinguished Lecture to the Florida State University Journal of Land Use & Environmental Law. My thanks to Roger Walker, an LL.M. candidate at Northwestern School of Law of Lewis and Clark College, for research assistance and to my colleague Bill Funk whose seminar presentation helped stimulate my thinking on the subject. This article is dedicated to the memory of Bill Hedeman who taught and shaped wetlands law for two decades with great distinction.

1. White House Office on Environmental Policy, *Protecting America's Wetlands: A Fair, Flexible, and Effective Approach* (Aug. 24, 1993) [hereinafter *Clinton Wetlands Plan*].

inconsistently implemented.<sup>2</sup> Moreover, unlike most areas of the aquatic environment, wetlands may be privately owned. This raises a host of regulatory and constitutional issues.<sup>3</sup> Along with the Clinton plan for old growth public land forests in the Pacific Northwest,<sup>4</sup> many saw the wetlands plan as an early indication of the new administration's approach to difficult tradeoffs between environment and development.<sup>5</sup>

The Clinton wetlands plan was widely touted as a "balanced" one, as it appeared to give something to everyone.<sup>6</sup> For environmentalists, the plan withdrew a proposal that would have reduced federally protected wetlands acreage by perhaps fifty percent. Also

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2. See, e.g., Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and A Call for Reform*, 60 U. COLO. L. REV. 695 (1989).

3. See generally William L. Want, LAW OF WETLANDS REGULATION (1993); *Focus: Clean Water Act's Section 404*, 60 U. COLO. L. REV. 685-922 (1989); Margaret N. Strand, *Wetlands Law: Parts I-III*, 23 ENVTL. L. REP. (Envtl. L. Inst.) 10,188, 10,284, 10,354 (1993), reprinted in ENVTL. L. REP., WETLANDS DESKBOOK 3-103 (1993); Hope Babcock, *Federal Wetlands Regulatory Policy: Up To Its Ears in Alligators*, 8 PACE ENVTL. L. REV. 307 (1991); *Symposium, Wetlands: Law, Science and Politics*, 4 MD. J. CONTEMP. LEGAL ISSUES 1 (1992-93); *A Wetlands Primer*, 7 NAT. RES. & ENVTL. (ABA) 1 (1992); Rocky Mt. Min. Law Found., *Wetlands Issues in Resources Development in the Western United States* (Min. L. Series no. 4, 1993) [hereinafter *Wetlands Issues in Resources Development*].

4. See U.S. Dep't of Agriculture, Forest Service & U.S. Dep't of the Interior, Bureau of Land Management, *Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl* (Feb. 1994). The Clinton plan will reduce public land timber harvests to about one-fifth of the amount harvested in the 1980s, setting aside reserves for spotted owls and other wildlife (in which some salvage logging and thinning would be allowed), establishing buffer zones around streams, and reducing the annual harvest level to 1.05 billion board feet. Under the plan, about 10,000,000 of 24.5 million acres of Northwest public land forests will be placed in reserves, about 4,000,000 acres will be open to commercial harvests, and the rest will be in areas allowing experimental logging. Implementation of the plan will cut an estimated 9,500 timber jobs from 1992 levels (29,000 from 1990 levels). See Kathie Durbin, *Forests: New Plan, Old Fight*, *The Oregonian*, Feb. 24, 1994, at C1. For background on the ancient forest controversy, see Alyson C. Flournoy, *Beyond the Spotted Owl Problem: Learning from the Old Growth Controversy*, 17 HARV. ENVTL. L. REV. 261 (1993).

5. See, e.g., Christopher Hanson, *Wetlands Warring: Environmentalists, Builders Criticize New Clinton Policy*, CHICAGO TRIBUNE, Sept. 5, 1993, at 3C; *Out of the Swamp Of Wetlands Policy: Clinton Administration Wades Into Deep End of Vital Water Quality Issue*, L. A. TIMES, Aug. 23, 1993, at M4; *Will Clinton Be Bush?*, N.Y. TIMES, Aug. 28, 1993, at 18; Stephen Barr, *Clinton To Revise Wetlands Policy: Plan Fails To Satisfy Conflicting Groups*, WASH. POST, Aug. 25, 1993, at A1.

6. See, e.g., David Johnston, *White House Asks Revision of Rules to Save Wetlands*, N.Y. TIMES, Aug. 25, 1993, at A1; LaJuana S. Wilcher, *A Truce on Wetlands*, N.Y. TIMES, Aug. 30, at A17; *Compromise on the Wetlands*, WASH. POST, Aug. 27, 1993, at A24; *Taking the Middle Ground on Wetlands*, HARTFORD COURANT, Sept. 4, 1993, at B8; Bruce Alpert, *Wetlands Policy Leaves Some Warm, Some Cold*, NEW ORLEANS TIMES-PICAYUNE, at A6; *A Balanced Policy On Wetlands*, CLEV. PLAIN DEALER, Aug. 31, 1993, at 6B; *Compromise on the Wetlands*, WASH. POST, Aug. 27, 1993, at A24; *A Better Policy for the Wetlands*, CHI. TRIB., Aug. 26, 1993, at 20; *Returning Science in Wetlands Regulation*, SEATTLE TIMES, Aug. 26, 1993, at B4; *Balancing Our Wetlands*, U.S.A. TODAY, Aug. 26, 1993, at 8A; Stephen Barr, *New Wetlands Policy Offers Something for Everyone*, PHILA. INQUIRER, Aug. 25, 1993, A1.

rescinded was a special exemption for wetlands development in Alaska.<sup>7</sup> The plan proposed a new rule clarifying that excavation activities in wetlands require a permit,<sup>8</sup> and offered support for a national goal of "no net loss" of wetlands.<sup>9</sup> The farm community received a regulatory exemption for over 53,000,000 acres of converted agricultural wetlands<sup>10</sup> and the appointment of the Soil Conservation Service as lead agency for identifying wetlands on agricultural lands.<sup>11</sup> Wetlands developers were promised a new administrative appeal process,<sup>12</sup> use of mitigation banks to increase regulatory flexibility,<sup>13</sup> new deadlines for permit decisions,<sup>14</sup> and less vigorous permit review for small projects with minor environmental impacts.<sup>15</sup> States were offered greater support for their wetlands regulatory programs<sup>16</sup> and expanded general permits under which the federal program generally defers to state decision making.<sup>17</sup> The plan also endorsed a congressional decision to employ a 1987 manual for identifying wetlands that was, not surprisingly, designed to be a compromise between two other identification manuals.<sup>18</sup>

The Clinton plan, in short, strove to achieve that elusive "balance" so necessary in resource disputes, where making everyone a little unhappy, yet giving everyone something, is considered the paradigm of reasonableness. At first glance, the plan appeared to succeed. Upon closer examination, however, the Clinton plan actually offered very few changes in direction from the Bush Administration. Apart from revoking the revised wetlands identification manual proposed by the Bush Administration and dropping a Bush eleventh-hour, election-year proposal to ease wetlands development restrictions in Alaska, there was little or no "protection" for wetlands in the Clinton plan that was not part of the Bush wetlands program. This assessment will no doubt concern those who are dismayed at the average

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7. *Clinton Wetlands Plan*, *supra* note 1, at 14-15, 23-24.

8. *Id.* at 22; 58 Fed. Reg. 45,008, 45,035-38 (1993) (to be codified at 33 C.F.R. § 3233(d) and 40 C.F.R. § 232.2).

9. *Clinton Wetlands Plan*, *supra* note 1, at 4, 18.

10. *Id.* at 11; 58 Fed. Reg. 45,008, 45,036-38 (1993) (to be codified at 33 C.F.R. § 328.3 and scattered sections of 40 C.F.R.) (1993).

11. *Clinton Wetlands Plan*, *supra* note 1, at 11; 58 Fed. Reg. 45,032-33 (1993).

12. *Clinton Wetlands Plan*, *supra* note 1, at 6-7.

13. *Id.* at 16-17.

14. *Id.* at 6.

15. *Id.* at 13-14.

16. *Id.* at 20-21.

17. *Id.* at 21.

18. *Id.* at 11.

annual wetlands loss of over 300,000 acres,<sup>19</sup> but it might help produce enough political consensus on the shape of the federal wetlands regulatory program for Congress to codify a program similar to the Clinton plan in amendments to section 404 of the Clean Water Act.

This Article examines the Clinton wetlands plan in some detail. Section II explains those provisions in the plan that increase substantive wetlands protection. Section III analyzes plan elements designed to add regulatory "flexibility" desired by wetlands developers. Section IV explores plan initiatives aimed at increasing state and local responsibility for wetlands regulation and also explains why those provisions should not be viewed as wetlands protection initiatives. Section V explains the provisions that aim to encourage voluntary efforts to preserve wetlands but concludes volunteerism is not a substitute for an effective regulatory program. Section VI suggests that the Clinton plan might be considered a pragmatic legislative proposal to a Congress which appears less interested in wetlands protection than in easing development controls on developers, but section VII concludes that the plan in fact represents "no net gain" in wetlands protection.

## II. PROTECTING WETLANDS

Although the Clinton plan called itself "Protecting America's Wetlands," the plan contained few initiatives aimed at increasing the substantive protection afforded wetlands from development pressures. Those initiatives it did include are either affirmations of, or in a few instances, repudiations of, Bush Administration policies. In short, the Clinton plan offered little new protection for wetlands.

### A. *Withdrawing the Bush Administration's Proposed Delineation Manual*

One of the complications of wetlands regulation is that there are a number of agencies involved, and historically they have not agreed as to what constitutes a wetlands. On the federal level alone, four agencies have major wetlands responsibilities: the Environmental Protection Agency (EPA) and the U. S. Army Corps of Engineers (the Corps) jointly operate the permit program authorizing discharges of dredged or fill material under section 404 of the Clean Water Act;<sup>20</sup>

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19. The U.S. General Accounting Office estimated annual wetlands losses at 300,000 to 500,000 acres in 1988. U.S. Gen'l. Accounting Office, *Wetlands: The Corps of Engineers' Administration of the Section 404 Program 2*, 20 (GAO/RCED-88-110, July 1988); see Want, *supra* note 3, § 2.01[4]; Babcock, *supra* note 3, at 313-17 (surveying regional wetlands losses).

20 33 U.S.C. § 1344; see sources cited in notes 2 and 3.

the Soil Conservation Service administers the swampbuster provisions of the Food Security Act under which farmers can be denied federal benefits for draining or filling wetlands;<sup>21</sup> and the Fish and Wildlife Service identifies wetlands as part of its National Wetlands Inventory project.<sup>22</sup> These agencies have employed varying definitions and different methodologies to identify wetlands.<sup>23</sup> If state wetlands programs are taken into account, in the late 1980s some fifty definitions of wetlands existed.<sup>24</sup> In 1988, a twenty-member panel of state and local officials, environmentalists, and the regulated community convened to form the National Wetlands Policy Forum. Included among its recommendations for reforming wetlands regulation was the adoption of a single definition for wetlands.<sup>25</sup>

As a result of the forum's recommendation, the four major federal wetlands agencies began work on a common wetlands delineation procedure. The Corps had published a delineation manual for its field offices a year earlier, in 1987.<sup>26</sup> This manual required the presence of three parameters for an area to be considered a wetlands:

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21. 16 U.S.C. § 3821-23. On the swampbuster provisions, see Strand, *supra* note 3, at 10,357; Linda A. Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve*, 34 U. KANS. L. REV. 577 (1986); James T.B. Tripp & Michael Herz, *Wetlands Preservation and Restoration: Changing Federal Priorities*, 7 VA. J. NAT. RESOURCES 221, 252-53 (1988); Dalana W. Johnson, *Saving the Wetlands from Agriculture: An Examination of Section 404 of the Clean Water Act and the Conservation Provisions of the 1985 and 1990 Farm Bills*, 7 J. LAND USE & ENVTL. L. 299, 306-18 (1992); Joseph G. Theis, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1, 9-11 (1991); Steve Moyer, *The 1990 Farm Bill: A Narrow Escape*, NAT'L WETLANDS NEWSL., Jan./Feb. 1991, at 5 (discussing the 1990 amendments to the swampbuster provisions).

22. 16 U.S.C. § 3921.

23. EPA and the Corps employed the same definitions of wetlands, 40 C.F.R. § 230.3 (EPA definition), 33 C.F.R. § 328.3 (Corps definition), but the U.S. Fish and Wildlife Service employed a substantially different definition in identifying wetlands for inclusion in the National Wetlands Inventory. See U.S. Fish and Wildlife Serv., *Classification of Wetlands and Deepwater Habitats of the United States* 107 (Pub. L. No. FWS/OBS-79/31, 1979); Ralph W. Tiner, *A Clarification of the U.S. Fish and Wildlife Service's Wetlands Definition*, NAT'L WETLANDS NEWSL., May/June 1989, at 6. The definition used by the Soil Conservation Service under the swampbuster provisions of the Food Security Act, 16 U.S.C. §§ 3821-24 (1988), also diverges from the EPA/Corps definition, exempting Alaskan lands "having a high potential for agricultural development and a predominance of permafrost soils." See Babcock, *supra* note 3, at 341-42 n.164.

24. Conservation Foundation, *Protecting America's Wetlands: An Action Agenda-The Final Report of the National Wetlands Policy Forum* 36 (1988) [hereinafter *Wetlands Policy Forum*].

25. *Id.* at 36-38. For a discussion of the evolution and make-up of the forum, see Babcock, *supra* note 3, at 334 n.136; see also Want, *supra* note 3, § 2.01[5] (overview of forum's recommendations); Blumm & Zaleha, *supra* note 2, at 762-64 (contributions and shortcomings of the forum report).

26. See Dep't of Army, Waterways Experiment Station, *Corps of Engineers Wetlands Delineation Manual* (Jan. 1987), reprinted in WETLANDS DESKBOOK, *supra* note 3, at 495-663.

wetlands soils, wetlands vegetation, and hydrology.<sup>27</sup> Because the 1987 manual required that each parameter be independently demonstrated, it was considered too rigid by some, and was not adopted by any agency other than the Corps. In 1989, the four agencies agreed on a revised manual that, while adhering to the three-parameter approach, allowed for inferring the requisite hydrology from the existence of soil and vegetation parameters and permitted the vegetative parameter to be determinative of wetlands under certain circumstances.<sup>28</sup> When field applications of the 1989 manual revealed a substantial enlargement in the scope of regulatory jurisdiction under section 404 of the Clean Water Act, the uproar from the regulated community, especially the farm and oil lobbies, convinced the Bush Administration to undertake a high-level policy review of the manual and hold a series of hearings around the country.<sup>29</sup> The resulting proposed revisions to the manual, which were eventually published in 1991,<sup>30</sup> would have significantly narrowed the scope of regulatory jurisdiction. Even though surface saturation is not required to maintain wetlands vegetation or soils, the proposed revisions would have required wetlands to have visible surface saturation for some period during the growing season.<sup>31</sup> The environmental community vehemently protested that the proposed manual would exclude approximately half of the nation's wetlands from regulatory protection.<sup>32</sup>

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27. See *Want*, *supra* note 3, § 4.09[4].

28. Federal Interagency Committee, *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (1989) [hereinafter 1989 manual], discussed in *Strand*, *supra* note 3, at 10,194; *Babcock*, *supra* note 3, at 342-46. The principal differences between the 1987 and 1989 manuals were the latter (1) allowed wetlands hydrology to be inferred from vegetation and soil indicators, on the premise that the latter could only have been developed under wet conditions; (2) permitted dominance of obligate vegetation (that which requires wetlands conditions) to eliminate the need for soil and hydrology tests; and (3) allowed for deviance from standard testing procedures for certain "problem" wetlands types. Lauranne P. Rink, *Wetlands Delineation, in Wetlands Issues in Resources Development*, *supra* note 3, at 3-5, 3-6; see also *Want*, *supra* note 3, § 4.09[3].

29. See *Strand*, *supra* note 3, at 10,194. A chief complaint about the 1989 manual was that it was not subjected to public comment, but courts have subsequently ruled that, as interpretive guidance, the manual was not subject to public notice and comment requirements of the Administrative Procedure Act. See, e.g., *United States v. Ellen*, 961 F.2d 462, 466 (4th Cir. 1992), discussed in *Want*, *supra* note 3, § 4.09[2], n.110.4.

30. 56 Fed. Reg. 40,446 (1991).

31. The proposal would have required inundation for 15 consecutive days or saturation for 21 consecutive days during the growing season. 56 Fed. Reg. 40,466, 40,452 (1991). In contrast, the 1989 manual required saturation only within six to eighteen inches of the surface for seven consecutive days. See *Strand*, *supra* note 3, at 10,195. For a comparison of the three manuals, see NAT'L WETLANDS NEWSL., Sept./Oct 1991, at 5, as corrected by NAT'L WETLANDS NEWSL., Nov./Dec. 1991, at 14.

32. See, e.g., Michael C. Blumm & Barry Needleman, *Wetlands Law: No Net Loss and Its Decline*, 3 RIVERS 122, 126 (1992) (60-85% of areas formerly considered wetlands in Idaho would

The Clinton plan withdrew the Bush proposed delineation manual, terming it "technically flawed" and claiming that its adoption would have "dramatically and indefensibly reduced the amount of wetlands subject to protection."<sup>33</sup> The plan called for continued use of the 1987 delineation manual, pending the results of a congressionally mandated study by the National Academy of Sciences (NAS).<sup>34</sup> The plan left it to the discretion of EPA and the Corps whether to revise delineation practices after the NAS study, but promised that any changes would be preceded by field testing and an opportunity for public comment.<sup>35</sup> The plan also promised that all federal employees conducting wetlands delineations will complete a delineation training program to improve accuracy and consistency, and instructed the Corps to propose regulations establishing a federal certification program for private sector delineation.<sup>36</sup> The withdrawal of the 1991 proposed delineation manual represented a significant victory for wetlands protection, but endorsement of the 1987 manual on the ground that it is simply less controversial than the two revisions<sup>37</sup> misses the point: what constitutes a wetlands ought to be considered as a scientific, not policy, issue.<sup>38</sup>

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no longer be regulated under the Bush proposal); Lauranne P. Rink, Remarks at the Rocky Mountain Mineral Law Institute's Conference on Wetlands Issues in Resources Development in the United States (Nov. 19, 1993) (75% of areas formerly considered wetlands in the Rocky Mountain region would no longer be considered wetlands).

33. *Clinton Wetlands Plan*, *supra* note 1, at 3.

34. *Id.* at 15. Congress mandated the NAS study in an effort to remove the controversy over wetlands delineation techniques from the political to the scientific arena. EPA and the Corps had in fact agreed to use the 1987 manual in a January 19, 1993 memorandum of agreement, 58 Fed. Reg. 4995 (1993). The 1992 Energy and Water Development Appropriations Act forbade the Corps from using the 1989 manual after October 1, 1991. Pub. L. No. 102-104, 105 Stat. 510, 518 (1991). For a thorough discussion of the delineation manual controversy, see Timothy D. Searchinger, *Wetlands Issues 1993: Challenges and a New Approach*, 4 MD. J. CONTEMP. LEGAL ISSUES 13, 19-29 (1992-93).

35. *Clinton Wetlands Plan*, *supra* note 1, at 15.

36. *Id.* at 7, 11. The plan suggested that wetlands delineations conducted by certified private sector delineators would speed jurisdictional determinations and directed the Corps to "streamline" the process of reviewing such delineations. *Id.* at 7.

37. *Id.* at 15 ("The Clinton Administration supports the use of the 1987 Wetlands Delineation Manual. . . . The use of the 1987 Manual by the Corps and EPA has increased confidence and consistency in identifying wetlands and has diminished the controversy associated with the 1989 and 1991 manuals."); see also *id.* at 3 (both the 1989 and 1991 manuals produced "controversy" and an "increasingly divisive" debate).

38. It seems to me that the definition of "wetland" is fundamentally a scientific question, although I acknowledge that because of scientific uncertainty, there are inevitable policy dimensions to the definition. My colleague, Bill Funk, who teaches environmental law to the Corps of Engineers in his spare time, disagrees. He believes that the definition of a wetland is essentially a policy question because it involves a question of federal jurisdiction. I think it involves other non-regulatory issues as well. While I believe that what is a wetland is fundamentally a scientific question, whether a wetland should be destroyed or preserved is a policy



*B. Reversing the Bush Administration's Alaska "One Percent" Proposal*

Among the most important initiatives in the Clinton plan was the withdrawal of the Bush Administration's proposed rule<sup>39</sup> that would have provided an exception to the section 404(b) mitigation requirements imposed on all proposed discharges of dredged or fill material into the nation's waters.<sup>40</sup> Alaska is a key battleground in the wetlands debate because forty-five percent of the state, or 174,000,000 acres, are wetlands. This comprises nearly two-thirds of the nation's remaining wetlands.<sup>41</sup> Wetlands dominate some regions of the state entirely, such as the North Slope on the Beaufort Sea and the Yukon-Kuskokwin River Delta in the southwest coastal region.<sup>42</sup>

Alaskan land development interests emphasize that development is geographically restricted by power availability, transportation systems, and the minuscule percentage of the state that is in private, non-native corporation ownership.<sup>43</sup> Developers also note that while some fifty-three percent of wetlands have been lost in the contiguous United States, less than one percent have been destroyed in Alaska.<sup>44</sup> These facts persuaded the Bush Administration to issue an election-eve proposal, in November 1992, that would have allowed an exemption from the "sequencing" provisions in the Corps-EPA Memorandum of Agreement on Mitigation (MOA) for states with less than a one percent loss of historic wetlands acreage.<sup>45</sup> The MOA

issue that a permit program like section 404 is well designed to resolve. The Clinton plan committed itself to basing federal wetlands policy on "best scientific information available." *Id.* at 4. See generally *Defining Wetlands: Science or Politics*, NAT'L WETLANDS NEWSL., Nov./Dec. 1991, at 10-14 (articles by Terry Huffman, Robert J. Pierce, and Peter Shelley); William S. Sipple, *Time To Move On*, Nat'l Wetlands Newsl., Mar./Apr. 1992, at 4 (advocating use of the 1989 manual as the most technically sound manual).

39. 57 Fed. Reg. 52,716 (1992)

40. See 40 C.F.R. § 230.10(d); see also Memorandum of Agreement between the Department of the Army and EPA Concerning the Determination of Mitigation under the Clean Water Act § 404(b) Guidelines (Feb. 6, 1990), reprinted in WETLANDS DESKBOOK, *supra* note 3, at 331 (establishing a three-part "sequencing" procedure under which mitigation efforts would focus first on avoiding impacts, second on minimizing impacts, and last on compensating for unavoidable impacts). See generally Strand, *supra* note 3, at 10,291; *Focus: Memorandum of Understanding on Mitigation*, NAT'L WETLANDS NEWSL., Mar./Apr. 1990, at 2-8 (articles by R. Erik Stromberg, Lajuana S. Wilcher & Robert W. Page, Linda Winter, and Don Young).

41. Jon Hall, *Mapping Uncharted Territory*, NAT'L WETLANDS NEWSL., Sept./Oct. 1993, at 13 (of 384,000,000 acres in Alaska, over 174,000,000 acres, or 45.5% of the state's surface area, are wetlands, according to a U.S. Fish and Wildlife Service study).

42. See Jeffrey K. Towner and Robert K. Oja, *Striking a Balance on the Last Frontier*, NAT'L WETLANDS NEWSL., Sept./Oct. 1993, at 7.

43. Ira Winograd, *Development and Conservation*, NAT'L WETLANDS NEWSL., Sept./Oct. 1993, at 9.

44. *Id.*; Hall, *supra* note 41, at 13; see also Roger A. Post, *Restoring Alaska's Wetlands*, NAT'L WETLANDS NEWSL., July/Aug. 1991, at 8 (suggesting that wetlands restoration in permafrost soil is not more difficult, and may be easier, than wetlands restoration elsewhere).

45. 57 Fed. Reg. 52,716 (1992).

requires that proposed discharges mitigate wetlands losses by (1) avoiding, (2) minimizing, and (3) compensating for adverse effects, in that order.<sup>46</sup> The proposed "one percent" rule would have eliminated the first and third requirements, so until one percent of the state's wetlands were destroyed, Alaska wetlands developers could have satisfied the 404(b) guidelines by simply taking steps to minimize adverse effects.<sup>47</sup> Only Alaska would have qualified for this exemption.

The Bush proposal was greeted enthusiastically by Alaskans,<sup>48</sup> but it was subjected to widespread attack elsewhere. More than 6,500 comments were received, eighty-three percent of which objected to the exemption.<sup>49</sup> Environmentalists pointed out that Alaskan wetlands serve the same functions as those in the contiguous United States, and that some Alaskan wetlands—such as coastal salt marshes, permanently flooded grass marshes on the Arctic coastal plain, and intertidal vegetated wetlands—are not abundant.<sup>50</sup> In addition, Alaska's annual rate of wetlands loss exceeds the national average, especially near metropolitan areas.<sup>51</sup> Environmentalists also noted that it is not difficult to obtain a 404 permit to fill wetlands in Alaska, as 97.3 percent of individual permits processed were granted over the last twenty years, and only one-half of one percent of those required compensatory mitigation.<sup>52</sup>

The Clinton plan rescinded the proposed Alaska "one percent" rule, claiming that Alaska's concerns could be met by increasing regulatory flexibility in the existing 404 permit program.<sup>53</sup> The plan directed EPA and the Corps to initiate meetings with Alaskan officials and citizens "to consider other environmentally appropriate

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46. See *supra* note 40. The municipality of Anchorage unsuccessfully filed suit against the MOA, alleging that its adoption without notice and comment procedures violated the Administrative Procedure Act. *Anchorage v. EPA*, 980 F.2d 1320 (9th Cir. 1992) (suit dismissed on ripeness grounds).

47. 57 Fed. Reg. 52,716, 52,718.

48. See Anthony N. Turrini, *Alaska's Folly*, NAT'L WETLANDS NEWSL., Sept./Oct. 1993 at 12. Turrini described Alaska's state wetlands director's position as "in a free market economy it is not an appropriate role of government to weigh the benefit of private sector projects." In addition, the director, Ira Winograd (*supra* note 43), asserted that the federal policy of avoiding wetlands loss was "not compatible with the State goal of wise use of our resources. Avoidance provides ascendancy to preservation." Winograd also objected to the policy of "no net loss," asserting, "It is inappropriate to require compensation where there is no shortage. No net loss is not necessary where loss is not a problem."

49. See *Clinton Wetlands Plan*, *supra* note 1, at 23.

50. Clayton D. Robison, Jr., *Alaskan Wetlands Are Not Different*, NAT'L WETLANDS NEWSL., Sept./Oct. 1993, at 5.

51. *Id.* at 6.

52. See *id.*; *Clinton Wetlands Plan*, *supra* note 1, at 23.

53. *Clinton Wetlands Plan*, *supra* note 1, at 24. On the "flexibility" in the 404(b) guidelines, see *infra* notes 153-159 and accompanying text.

means to assure regulatory flexibility and the feasibility of alternative permitting procedures in Alaska.<sup>54</sup> Alaska has been less than satisfied with the ensuing public dialogue, however,<sup>55</sup> and Alaska's two senators have made clear that the state will seek congressional enactment of something similar to the "one percent" rule in the impending Clean Water Act Amendments.<sup>56</sup>

The Clinton plan's rejection of the Alaska "one percent" rule was one of its most significant departures from Bush Administration policies, and perhaps its most important contribution to substantive wetlands protection. A chief reason the national press perceived the Clinton plan to be a balanced one was the withdrawal of the Bush Alaska exemption proposal.<sup>57</sup> This environmental victory, however, ought to be recognized as a limited one, subject to quick adjustment or reversal by Congress, which now has the Alaska wetlands issue high on its Clean Water Act Amendment agenda.<sup>58</sup>

### C. *Affirming the Bush Administration's Proposed Tulloch Rule*

What activities are subject to regulation under the 404 program has always been a controversial issue. Because the Clean Water Act's language requires permits for "discharges of dredged or fill material,"<sup>59</sup> it has never been entirely clear whether activities that destroy wetlands by excavation, ditching, or channelization required permits, as these activities often involve only incidental discharges. The Corps has been particularly sensitive to this issue because, as the nation's largest navigation dredger, it has always sought to avoid subjecting the act of dredging (as opposed to discharges of dredged

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54. *Clinton Wetlands Plan*, *supra* note 1, at 24.

55. *See Alaskans Blast Clinton Approach to State's Wetlands Concerns*, *INSIDE EPA*, Oct. 29, 1993, at 12 (objecting to limited opportunities to participate in hearings held in late October and early November). *But cf.* Letter of J. Scott Feierabend and Anthony N. Turrini, National Wildlife Federation, to Robert K. Oja, U.S. Army Corps of Engineers, & Alvin L. Ewing, Environmental Protection Agency (Nov. 29, 1993) (contending that the public record resulting from the first round of the Alaska "flexibility" meetings indicates that the operation of the 404 program in Alaska is less stringent, less rigid, and less protective of wetlands than in the rest of the country, and claiming that 404 regulation works no hardship on Alaskans but is frequently little more than a formality which fails to protect the public's interest in wetlands).

56. *Id.* at 13; *see also Senate Environment Panel Weighs Unique Status for Alaska Wetlands*, *INSIDE EPA*, Sept. 3, 1993, at 11 (asserting that the Senate Environment and Public Works Committee's willingness to work with Alaska's senators to address the state's concerns indicates that the Clinton plan's decision to withdraw the "one percent" rule will not be the final word as to whether Alaskan wetlands regulation will differ significantly from the rest of the country).

57. *See, e.g., Wet In Alaska, Dry Below*, *ST. LOUIS POST-DISPATCH*, Sept. 5, 1993, at 2B; *see also* sources cited *supra* note 6.

58. *See Senate Environmental Panel Weighs Unique Status For Alaskan Wetlands*, *INSIDE EPA*, Sept. 3, 1993, at 11.

59. 33 U.S.C. § 1344(a).

material) to 404 regulation.<sup>60</sup> Consequently, Corps guidance, dating back to the late 1970s, indicated that *de minimis* discharges associated with normal dredging activities were not subject to 404 regulation.<sup>61</sup> Whether this *de minimis* exception applied to activities other than dredging remained unclear, and the exclusion was inconsistently interpreted by Corps District Engineers. Most of them did not regulate ditching, channelization, mining, and other excavation activities if the associated discharges were limited to small volume and incidental to the activity.<sup>62</sup> Because these excavation activities often destroyed wetlands without triggering 404 regulation, many people, including the former head of the Corps, believed that 404 was not a wetlands protection program.<sup>63</sup>

In 1983, in *Avoyelles Sportsmen's League, Inc., v. Marsh*, the Fifth Circuit ruled that the term "discharge" could reasonably be applied to mechanized landclearing activities that redeposit soil in wetlands.<sup>64</sup> Subsequently, the Corps issued regulatory guidance letters interpreting *Avoyelles*, but that guidance was limited to explaining circumstances under which mechanized landclearing triggered 404 requirements; it did not address whether other excavation activities required permits.<sup>65</sup> In 1988, however, the National Wetlands Policy Forum recommended that 404 jurisdiction be interpreted to include excavation and drainage activities.<sup>66</sup> Three years later, the Bush Administration incorporated this recommendation into its comprehensive wetlands plan.<sup>67</sup> Then, in 1992, as part of a settlement of *North Carolina Wildlife Federation v. Tulloch*,<sup>68</sup> the Corps proposed

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60. See Blumm & Zaleha, *supra* note 2, at 703.

61. See 58 Fed. Reg. 45,014 (1993).

62. *Id.* at 45,013-14.

63. See Testimony of Robert K. Dawson, Acting Ass't Secretary of the Army for Civil Works, Before the Subcomm. on Environmental Pollution of the Sen. Comm. on Environment and Public Works 11 (May 21, 1985) (stating Corps view that "Congress did not design § 404 to be a wetlands protection mechanism and it does not function well in that capacity"), reported in *Senate Subcommittee Holds Clean Water Act § 404 Oversight Hearings*, NAT'L WETLANDS NEWSL., July/Aug. 1985, at 8-9.

64. 715 F.2d 897, 923-24 (5th Cir. 1983). For a good discussion of *Avoyelles* and related cases, see Theis, *supra* note 21, at 32-45; see also Gerald Torres, *Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property*, 34 U. KANS. L. REV. 539, 552-53, 563-66 (1986).

65. See RGL Nos. 85-4, 90-5, discussed in 58 Fed. Reg. 45,008, 45,015 (1993). RGL 90-5, reprinted in WETLANDS DESKBOOK, *supra* note 3, at 309, took the position that most mechanized landclearing activities triggered 404 jurisdiction.

66. *Wetlands Policy Forum*, *supra* note 24, at 4, 44-46.

67. See Michael R. Deland, *No Net Loss of Wetlands: A Comprehensive Approach*, 7 NAT. RES. & ENVT. (ABA) no. 1 at 5 (1992). The Bush wetlands plan was outlined in a White House press release that is reprinted in WETLANDS DESKBOOK, *supra* note 3, at 475-79.

68. No. C90-713 (E.D.N.C. Mar. 5, 1992). For background on this case, see Theis, *supra* note 21, at 42-43, 54.

rules clarifying that mechanized landclearing, ditching, channelization, and other excavation activities require 404 permits where they would destroy or degrade wetlands.<sup>69</sup> As another part of the settlement, the Corps proposed rules stating that pilings are subject to 404 where they have the physical effect or functional use of a fill, such as pilings that support housing or office buildings.<sup>70</sup> The proposed rules elicited some 6,300 comments.<sup>71</sup>

The Clinton wetlands plan adopted these proposed *Tulloch* rules, with only some small changes, and final rules were promulgated on August 25, 1993.<sup>72</sup> Shortly thereafter, a coalition of development groups filed suit challenging the new rules.<sup>73</sup> The new rules defined "dredged material" in such a way as to require permits for *any* activities producing incidental redeposition of soil if the effect of the activity is to destroy or degrade wetlands.<sup>74</sup> Altering a wetland's hydrological regime or vegetative composition, or adversely affecting fish and wildlife habitat, are considered degradation sufficient to trigger permit requirements.<sup>75</sup> The rule redefined the exception for *de minimis* activities in terms of environmental effects, instead of discharges.<sup>76</sup> Perhaps not surprisingly, the Corps exempted from regulation incidental discharges of dredged materials during normal dredging operations, unless the discharge occurs in wetlands.<sup>77</sup>

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69. 57 Fed. Reg. 26,894, 26,898 (1992).

70. *Id.* at 26,898-99.

71. See 58 Fed. Reg. 45,008 (1993).

72. *Clinton Wetlands Plan*, *supra* note 1, at 22; 58 Fed. Reg. 45,008, 45,035-37 (1993). The most significant change in the final rules was eliminating the proposed rule's presumption that excavation activities always produce discharges of dredged or fill material. Nevertheless, the final rules warned developers that they run a high risk of violating the law if they do not obtain a permit for excavation activities because any incidental redeposition of dredged materials, "however temporary or small," will require a permit if the excavation would destroy or degrade wetlands. *Id.* at 45,017.

73. See *Developers Claim Wetlands Plan Needs Congressional Approval*, CHICAGO TRIBUNE, Aug. 25, 1993, at 6 (describing a suit filed on August 24, 1993 by the National Association of Homebuilders, the American Mining Congress, the American Road and Transportation Builders Association, and the National Aggregates Association); see also *Industry Sues Over Rule Expanding Federal Wetlands Oversight*, INSIDE EPA, Aug. 27, 1993, at 11.

74. 58 Fed. Reg. at 45,037-38 (to be codified at 33 C.F.R. § 323.2).

75. *Id.*

76. *Id.* Thus, activities such as walking, grazing, vehicular traffic, and boating will not require permits because they do not destroy or degrade wetlands. *Id.* at 45,020. The rule also grandfathered certain activities such as mining and other ongoing activities at the time of the rule's publication where they will be completed within one year. *Id.* at 45,036, 45,038. Because landclearing activities were already subject to 404 regulation under the Corps' preexisting guidance, see *supra* note 65 and accompanying text, they were not included in the grandfather provisions. *Id.*

77. *Id.* at 45,025-26, 45,036, 45,038 (to be codified at 33 C.F.R. § 323.2(d)(3)(ii) and 40 C.F.R. § 232.2).

The new rules also adopted the Bush Administration's proposed extension of 404 regulation to include the placement of pilings where the pilings would have the physical effect of a discharge of fill material.<sup>78</sup> Some small changes in the final rule made the pilings rule closely resemble the excavation rule in that the trigger for 404 regulation is an "effects" test.<sup>79</sup> The trigger for regulation is whether the pilings will have the effect of discharging fill, and a key issue will be how densely the pilings are placed.<sup>80</sup>

The Clinton plan's adoption of the excavation and pilings rules closed significant loopholes in 404 regulation and moved the program in the direction of providing comprehensive wetlands protection. The Bush Administration deserves most of the credit for these improvements, though, for it was the Bush Administration that agreed to the *Tulloch* settlement and proposed the rules for its implementation.<sup>81</sup> The final rules supplied important improvements in wetlands protection, but the effect of including them in the Clinton plan makes that plan look more balanced, and less focused on easing development restrictions than would otherwise be the case.

#### D. Codifying the Bush Administration's "No Net Loss" Goal

The Clinton plan endorsed "no net loss" of remaining wetlands as an interim goal and established a long-term goal of increasing the quality and quantity of the nation's wetlands.<sup>82</sup> "No net loss" of wetlands was a recommendation of the Wetlands Policy Forum in 1988, and later that year it became a Bush campaign pledge.<sup>83</sup> While wetlands advocates supported the concept of "no net loss," they cautioned that this goal would not produce improved wetlands protection if the means to achieve it was heavy reliance on the unproven science of wetlands creation.<sup>84</sup> The "no net loss" goal subsequently became something of a cruel joke when the Bush Administration

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78. *Id.* at 45,036, 45,038 (to be codified at 33 C.F.R. §§ 323.2 (c) and 323.3(c), and 40 C.F.R. § 232.2).

79. *Id.* at 45,029-31. The final rule deleted the proposed rule's "functional use" test as a trigger for 404 regulation and also eliminated the proposed exemption for structures "traditionally constructed" on pilings. *Id.* at 45,036, 45,038 (to be codified at 33 C.F.R. § 323.3(c) and 40 C.F.R. § 232.2).

80. *Id.* at 45,029-31.

81. See *supra* notes 68-71 and accompanying text.

82. *Clinton Wetlands Plan*, *supra* note 1, at 4.

83. See *Wetlands Policy Forum*, *supra* note 24, at 3, 18-19; Babcock, *supra* note 3, at 328-40; Deland, *supra* note 67, at 3-4; Strand, *supra* note 3, at 10,194.

84. See, e.g., Blumm & Zaleha, *supra* note 2, at 763-64 (noting that 50% of wetlands creation projects fail).

proposed the 1991 manual for delineating wetlands, which would have considerably narrowed regulatory jurisdiction.<sup>85</sup>

The Clinton plan's promise to codify the "no net loss" goal into a revised Executive Order on wetlands may be a significant advance in wetlands protection,<sup>86</sup> but the extent of protection supplied will be a consequence of how "no net loss" is to be achieved. Because of the heavy emphasis the Clinton plan placed on reducing burdens on landowners by increasing regulatory "flexibility" and emphasizing wetlands banking,<sup>87</sup> it may be that the Clinton approach to "no net loss" will rely heavily on mitigating losses by wetlands creation, a science that has yet to be proven a viable method of avoiding wetlands losses.<sup>88</sup>

### III. INCREASING REGULATORY FLEXIBILITY FOR LANDOWNERS

If the substantive wetlands protection provisions of the Clinton plan are few and subject to qualifications, the initiatives promising greater regulatory flexibility are numerous and prominent. "Addressing landowner concerns" was placed first among the items in the plan, and this prominence is more than symbolic, as the reform package contains many concessions important to the regulated community. The most significant of these are provisions aimed at reducing the impact of wetlands regulation on farmers, but the plan also makes promises designed to benefit all landowners subject to 404 regulation. These include such initiatives as increasing flexibility in the application of 404 permit requirements, setting deadlines for permit decision making, and giving landowners the right to administratively appeal permit decisions.

#### A. Exempting Prior Converted Cropped Wetlands

As the Corps began to use the 1989 wetlands delineation manual,<sup>89</sup> it identified wetlands in agricultural production for the first time.<sup>90</sup> When the agency attempted to assert regulatory jurisdiction over cropped wetlands in Louisiana and on the Delmarva Peninsula,

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85. See *supra* notes 30-32 and accompanying text; see also Janice Goldman-Carter, *The Unraveling of No Net Loss*, NAT'L WETLANDS NEWSL., Sept./Oct. 1992, at 12.

86. *Clinton Wetlands Plan*, *supra* note 1, at 19.

87. See *infra* notes 153-159 (regulatory flexibility), 168-176 (wetlands banking) and accompanying text.

88. See, e.g., Ann Redmond, *How Successful is Mitigation?*, NAT'L WETLANDS NEWSL., Jan/Feb. 1992, at 5 (only 27% of 119 wetlands creation projects in Florida produced functional wetlands; in freshwater wetlands the success rate was just 12%); see also *infra* notes 166-67 and accompanying text.

89. See *supra* notes 28-29 and accompanying text.

90. See Babcock, *supra* note 3, at 343.

the resulting uproar from the agricultural community caused the Corps to issue a regulatory guidance letter in September 1990 that exempted "prior converted" cropped wetlands from 404 regulation.<sup>91</sup> The guidance defined "prior converted cropland" as areas that were drained and cropped prior to December 23, 1985,<sup>92</sup> the date Congress enacted the swampbuster provisions of the Food Security Act, which eliminated agricultural subsidies for farmers who clear and drain wetlands.<sup>93</sup> The Corps' guidance adopted this definition of "prior converted cropland" from the Food Security Act manual published by the Soil Conservation Service.<sup>94</sup> In effect, the Corps reversed the 1989 manual's position that a cropped area was a wetlands if wetlands vegetation would return when cropping ceased. Instead, the guidance returned to the Corps' position under the 1987 delineation manual, which was that cropped areas did not constitute wetlands where wetlands vegetation was removed by agricultural activity.<sup>95</sup> The guidance distinguished prior converted wetlands from "farmed" wetlands, which remain subject to 404 jurisdiction because they continue to retain wetlands soil and hydrological characteristics. The guidance defined "farmed" wetlands to include cropped potholes, playas, and areas with fifteen consecutive days or more of inundation during the growing season.<sup>96</sup>

Environmentalists claimed that the exclusion of prior converted cropland was inconsistent with the goals of no net loss of wetlands and restoring the biological and physical integrity of the nation's waters, and also a violation of the Administrative Procedure Act because it constituted substantive rulemaking without public notice and comment.<sup>97</sup> They contended that the exclusion was arbitrary because many prior converted croplands perform significant wetlands functions such as retaining flood waters, recharging groundwater,

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91. See *id.* at 343-47 for background on the controversy, including a suggestion that the Corps misinterpreted the Interagency Manual that culminated in the issuance of RGL 90-7, published at 58 Fed. Reg. 17,210 (1993); see also *Viewpoint: Agriculture and Section 404*, NAT'L WETLANDS NEWSL., Nov./Dec. 1990, at 2-5 (articles by Michael L. Davis, Jan Goldman-Carter, and Congressman Lindsay Thomas).

92. RGL 90-7, *supra* note 91, § 5a.

93. 16 U.S.C. §§ 3821-24; on the swampbuster program, see *supra* notes 21, 23, *infra* notes 231-36 and accompanying text; see also Christopher Lant, *Making Better Use of the Farm Bill*, NAT'L WETLANDS NEWSL., Jan./Feb. 1993, at 11.

94. RGL 90-7, *supra* note 91, § 5 (a). Technically, the guidance reinterpreted "normal circumstances" in the definition of wetlands (see 33 C.F.R. § 328.3(b)) to be the cropped conditions, not the conditions that would occur if cropping ceased. RGL 90-7, *supra* note 91, § 5d.

95. See 58 Fed. Reg. at 45,032 (discussing RGL 90-7).

96. RGL 90-7, *supra* note 91, § 5b.

97. See, e.g., Theis, *supra* note 21, at 47-48; Babcock, *supra* note 3, at 348-50.



improving water quality, and supplying waterfowl habitat.<sup>98</sup> Ultimately, the only argument the environmentalists made that bore fruit was the claim that the prior converted cropland exclusion required notice and comment rulemaking, and the Corps issued a proposed rule on June 15, 1992.<sup>99</sup>

The Clinton plan adopted wholesale the proposed rule it inherited from the Bush Administration, acknowledging a loss of regulatory jurisdiction over 53,000,000 acres and claiming, without explanation, that they "no longer exhibit wetlands characteristics."<sup>100</sup> The day after the plan was released the Corps and EPA promulgated final rules changing the regulatory definition of waters of the United States to exclude prior converted croplands.<sup>101</sup> The Clinton plan claimed that the rules were necessary to eliminate "needless duplication and frustrating inconsistenc[ies]" between the Soil Conservation Service's implementation of the swampbuster program and 404 regulation.<sup>102</sup> The plan did not attempt to explain why this consistency could not have been achieved short of a wholesale exclusion of 53,000,000 acres, but clearly the plan was more concerned with the agricultural community's claims of overregulation than with providing regulatory protection to cropped wetlands that still serve important wetlands functions. Thus, while the Clinton plan eliminated the Bush Administration's proposed wetlands delineation manual that would have severely restricted 404 jurisdiction, the regulatory exclusion of prior converted wetlands effectively withdrew the 404 program from most of the area, which was the aim of the agricultural community.<sup>103</sup>

### B. Elevating the Role of the Soil Conservation Service

A headline aspect of the Clinton plan was its effort to reduce "overlaps and inconsistencies" in wetlands regulation affecting farm lands by elevating the role of the Soil Conservation Service (SCS) in

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98. See Jan Goldman-Carter, *Cropped Wetlands Deserve Protection, Too*, NAT'L WETLANDS NEWSL., Nov./Dec. 1990, at 3.

99. 57 Fed. Reg. 26,894, 26,899 (1992). The proposal was included along with the proposed rules required by the *Tulloch* settlement. See *supra* notes 68-71 and accompanying text.

100. *Clinton Wetlands Plan*, *supra* note 1, at 11 (but stating the land had been converted from wetlands to croplands prior to passage of the Food Security Act of 1985).

101. 58 Fed. Reg. 45,008, 45,036-38 (to be codified at 33 C.F.R. § 328.3(a)(8) and scattered sections of 40 C.F.R.).

102. See *Clinton Wetlands Plan*, *supra* note 1, at 10.

103. The Clinton plan also directed EPA and the Corps to incorporate examples of "certain" artificial wetlands "such as non-tidal drainage and irrigation ditches . . . on upland" that are to be excluded from Clean Water Act jurisdiction. *Id.* at 12, 16. This directive does not seem designed to disavow jurisdiction over all artificially created wetlands, however. See *Want*, *supra* note 3, § 11.07 (discussing the case law of artificial wetlands).

identifying wetlands.<sup>104</sup> According to the plan, SCS wetlands determinations will represent "the final government position" on 404 and swampbuster jurisdiction.<sup>105</sup> The Clean Water Act, however, gives the SCS no such final authority, a fact acknowledged in an accompanying regulatory preamble.<sup>106</sup> Nevertheless, the intention of EPA and the Corps is to "rely generally" on SCS wetlands determinations, although recognizing that final jurisdictional authority rests with EPA.<sup>107</sup> An interagency agreement to this effect was signed on January 3, 1994.<sup>108</sup>

Elevating the SCS role in wetlands regulation is troublesome to those who have studied the agency's inconsistent implementation of the swampbuster program. For example, fewer than 200 farmers lost government benefits between 1985-90 because of wetlands conversions.<sup>109</sup> The distinction between "cropped" and "farmed" wetlands has been a particular source of problems, as farmers have used broad appeal rights under the swampbuster program to convince SCS district offices to change determinations of "farmed" wetlands (the drainage of which subjects a farmer to loss of federal benefits) to "cropped" wetlands (no loss of benefits for drainage).<sup>110</sup>

The Clinton plan sought to respond to the environmentalists' concerns that the SCS has been captured by the farmers it serves by promising revised SCS procedures to delineate agricultural wetlands with greater consistency, along with EPA and Corps monitoring of SCS determinations on a programmatic level.<sup>111</sup> The apparent idea is to allow farmers to deal with only one agency, the SCS, while attempting to infuse into that agency greater sensitivity to wetlands protection. Although a revised draft SCS delineation manual appeared to offer some safeguards against farmer pressure to designate "farmed" wetlands as "cropped" wetlands,<sup>112</sup> EPA staff subsequently complained that the revision still was not consistent

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104. See sources cited *supra* notes 5-6.

105. *Clinton Wetlands Plan*, *supra* note 1, at 11.

106. 58 Fed. Reg. 45,033 (to be codified at 33 C.F.R. § 328.3(a)(8)) ("In light of EPA's ultimate statutory responsibility for determining the scope of [Clean Water Act] jurisdiction, we cannot satisfy commentators who argued that we should be required to defer absolutely to SCS determinations.").

107. *Id.* at 45,033, 45,036-38 (to be codified at 33 C.F.R. § 328.3(a)(8) and scattered sections of 40 C.F.R.).

108. 59 Fed. Reg. 2920 (1994). See *More 'Farmed Wetlands' May Be Saved Under Clinton Plan, Some Say*, INSIDE EPA, Sept. 3, 1993, at 15 (discussing the interagency agreement which was then under negotiation).

109. Johnson, *supra* note 21, at 310.

110. See INSIDE EPA, *supra* note 108, at 15.

111. *Clinton Wetlands Plan*, *supra* note 1, at 11.

112. See INSIDE EPA, *supra* note 108, at 15-16.

with the Corps' 1987 delineation manual.<sup>113</sup> Successful implementation of these reforms rests uneasily on the shoulders of local SCS district officers who will not be subject to site-specific oversight by EPA.<sup>114</sup>

### C. *Adopting an Administrative Appeals Process*

The fact that the appeal process has been employed by farmers to evade wetlands protection in the swampbuster program<sup>115</sup> did not deter the Clinton wetlands plan from opening the appeal process to all landowners. The plan directed the Corps to design a process that will allow landowners to appeal three types of decisions: (1) assertions of regulatory jurisdiction, (2) permit denials, and (3) imposition of administrative penalties.<sup>116</sup> The Corps regulations already allow appeals of administrative penalties,<sup>117</sup> but there are currently no administrative appeals of assertions of regulatory jurisdiction or permit denials. This lack of administrative process has forced landowners to challenge Corps jurisdiction and permit decisions initially in court, where the Corps is entitled to judicial deference.<sup>118</sup>

The Clinton plan gave the Corps one year to develop an expanded appeal process that allows public participation in appeals of permit denials, but the public apparently will not be able to participate in appeals of assertions of regulatory jurisdiction.<sup>119</sup> Moreover, the plan made no mention of a public right to administratively appeal Corps refusals to exercise regulatory jurisdiction, arguably the appeals of most interest to the public. Although the plan also failed to mention a right of landowners to challenge the conditions contained in permits, forthcoming Corps regulations will apparently recognize such a right, in recognition of the frequent landowner objections to mitigation conditions included in permits.<sup>120</sup>

The forthcoming regulations will require landowners to exercise their administrative appeal rights as a prerequisite to seeking judicial review.<sup>121</sup> As it seems likely that the Corps will make use of this

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113. See *EPA Regions Raise Concerns Over Accord Giving USDA Wetlands Lead*, INSIDE EPA, Jan. 14, 1994, at 6.

114. See *id.* at 5 ("EPA regional sources say SCS will have to undergo a complete overhaul at the field level to effectively implement the MOA.").

115. See *supra* text accompanying note 110.

116. *Clinton Wetlands Plan*, *supra* note 1, at 6.

117. 33 C.F.R. § 326.6(h)-(i).

118. See *Want*, *supra* note 3, § 9.01[1], 9.03, 9.05.

119. See *Clinton Wetlands Plan*, *supra* note 1, at 6.

120. Conversation with William Funk, Professor of Law, Northwestern School of Law of Lewis and Clark College, April 8, 1994.

121. *Id.*

appeal process to bolster the administrative record accompanying decisions that are adverse to landowners, it may be that, although packaged as a reform addressing landowner concerns, the new appeal procedures will make successful landowner judicial challenges less probable. Clearly, with a regulatory program authorizing some 100,000 activities annually (15,000 by individual permits) and denying some 500 permits annually,<sup>122</sup> and with intense landowner interest in individual projects, the Corps' administrative appeal process is going to be widely invoked and will soon occupy the attention of the practicing bar.<sup>123</sup>

#### *D. Imposing Permit Processing Deadlines*

Proclaiming that it believed the federal government had a responsibility to conduct regulatory programs in an "efficient, responsive, and fair" manner, the Clinton plan directed the Corps to modify its regulations to require permit decisions within ninety days of public notice of the proposed activity, unless precluded by other laws.<sup>124</sup> The plan apparently offered this promised deadline as another concession to the regulatory community, but current Corps regulations call upon district engineers to make permit decisions within sixty days of a completed application unless precluded by other statutory or regulatory requirements.<sup>125</sup> It is hardly likely that 404 permit applicants will find the Clinton plan's promise of an extra thirty days for the Corps to make permit decisions to be a regulatory improvement. Moreover, all promised "deadlines" are somewhat misleading, as such regulatory reforms cannot alter special procedures required by such laws as the Endangered Species Act, the Coastal Zone Management Act, the National Historic Preservation Act, and the state water quality certification provisions of the Clean Water Act.<sup>126</sup>

#### *E. Promising New "Flexibility" in the 404(b) Guidelines*

Since their promulgation in 1980, the 404(b) guidelines have served as the chief environmental criteria governing the issuance of

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122. Remarks of Lance D. Wood, Assistant Chief Counsel for Environmental Law and Regulatory Programs, U.S. Army Corps of Engineers, at the Rocky Mountain Mineral Law Foundation's Conference on "Wetlands Issues in Resource Development in the Western United States" (Nov. 19, 1993).

123. The Clinton plan promised "strong[ ] support for the additional personnel and funding necessary to implement successfully the appeals process." *Clinton Wetlands Plan*, *supra* note 1, at 6.

124. *Id.*

125. 33 C.F.R. § 325.2(c)(3).

126. *See* 33 C.F.R. § 325.2(b) (outlining the procedures required by these statutes).

404 permits.<sup>127</sup> During the 1980s, however, EPA and the Corps disagreed frequently over how to interpret the guidelines, producing a regulatory program exhibiting considerable regulatory ambivalence.<sup>128</sup> One result was a number of EPA vetoes<sup>129</sup> of Corps permits grounded largely on EPA's determination that the Corps misinterpreted the guidelines.<sup>130</sup> The chief source of disagreement was the guidelines' requirement that a 404 permit be denied unless the applicant could show that no practicable alternatives to the proposal existed that would cause less harm to the environment.<sup>131</sup> The guidelines also required minimization of adverse effects even when there were no practicable alternatives.<sup>132</sup> As one means to minimize impacts, the guidelines authorized restoration of degraded habitat or creation of new habitat to compensate for destroyed habitat.<sup>133</sup>

EPA always interpreted these requirements to impose a "sequencing" procedure on 404 decisionmaking, under which avoidance of adverse impacts was preferred to minimizing impacts and compensating with substitute habitat was authorized only as a last resort.<sup>134</sup> The Corps did not agree and frequently issued permits for activities based on compensatory mitigation (wetlands creation or restoration) without a showing that there were no practicable alternatives to the proposed project.<sup>135</sup> The upshot was a few highly

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127. 404(b) guidelines are promulgated by EPA "in conjunction with" the Corps. 33 U.S.C. § 1344(b)(1). Interim final 404(b) guidelines were originally published in 1975 as a result of the decision in *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) (requiring the Corps to extend the geographical scope of the 404 program to waters not considered to be traditionally navigable). The guidelines were comprehensively revised in 1980. 40 C.F.R. § 230. However, the Corps did not concede that the guidelines imposed binding requirements until 1984, a consequence of lawsuit settlement arising out of *National Wildlife Fed'n v. Marsh*, 14 ENVTL. L. REP. (Env. L. Inst.) 20,262, 20,264 (D.D.C. 1984). See Blumm & Zaleha, *supra* note 2, at 740-42.

128. See generally Oliver A. Houck, *Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean Water Act and Similar Environmental Laws*, 60 U. COLO. L. REV. 773, 777-94 (1989) (including case studies of EPA-Corps disagreements).

129. Under section 404(c), 33 U.S.C. § 1344(c), EPA may veto Corps permits, after providing an opportunity for a hearing, if the proposal would produce an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." See Blumm & Zaleha, *supra* note 2, at 740-42.

130. See Houck, *supra* note 128, at 790-94; see also Robert Uram, *The Evolution of the Practicable Alternatives Test*, 7 NAT. RESOURCES & ENV'T. (ABA) no. 1, at 15 (1992); Brian R. Hanson, *Configuring Natural Resource Projects to Avoid, Minimize, or Mitigate Wetlands Impacts*, in WETLANDS ISSUES IN RESOURCES DEVELOPMENT, *supra* note 3, at 6-10 to 6-12.131. 40 C.F.R. § 230.10(a).

132. *Id.* § 230.10(d), 230.70-77.

133. *Id.* § 230.75(d).

134. See Babcock, *supra* note 3, at 331-32.

135. *Id.*; Houck, *supra* note 128, at 807-813.

publicized EPA vetoes, such as the Attleboro Mall, the Two Forks Dam, and the Ware Creek Reservoir,<sup>136</sup> but more often widespread wetlands loss without effective compensation.<sup>137</sup>

The National Wetlands Policy Forum's 1988 report criticized this interagency disagreement over mitigation and called for adoption of "sequencing" of mitigation procedures.<sup>138</sup> The report, which also recommended the national "no net loss" policy that President Bush endorsed,<sup>139</sup> induced negotiations between EPA and the Corps that culminated in the signing of a memorandum of agreement on mitigation on February 6, 1990.<sup>140</sup> In the agreement, EPA and the Corps pledged to apply sequencing of mitigation where practicable, to give preference to on-site, in-kind mitigation where compensatory mitigation was warranted, and to exempt from sequencing discharges producing insignificant environmental losses.<sup>141</sup> The agreement also suggested that sequencing was not practicable in areas with a high proportion of wetlands, such as Alaska.<sup>142</sup>

Despite the exemption from sequencing for Alaska, the Alaska oil and gas industry led a campaign against the memorandum of agreement.<sup>143</sup> This opposition apparently persuaded the Bush Administration to include in its 1991 wetlands plan a suggestion that sequencing be limited to wetlands categorized as "high value."

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136. See Margot Zallen, *The Mitigation Agreement—A Major Development in Wetlands Regulation*, 7 NAT. RESOURCES & ENV'T. (ABA) no. 1 at 19, 19-20 (1992). On the Attleboro Mall veto, also known as Sweedens Swamp, 51 Fed. Reg. 22,977 (1986), see Blumm & Zaleha, *supra* note 2, at 742-44; Christine A. Klein, *Bersani v. EPA: The EPA's Authority to Veto Wetlands Filling Permits*, 19 ENVTL. L. 389 (1989) (discussing *Bersani v. Robichaud*, 674 F. Supp. 405 (N.D.N.Y. 1987), *aff'd*, 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1556 (1989)). On the Two Forks Dam veto, 56 Fed. Reg. 76 (1991), under challenge in *Alameda Water & Sanitation Dist. v. EPA*, No. 91-M-2047 (D. Colo. filed Nov. 22, 1991), see James W. Sanderson & Robert D. Comer, *Overview of Regulation Under Section 404 of the Clean Water Act*, in WETLANDS ISSUES IN RESOURCES DEVELOPMENT, *supra* note 3, at 1-20. On the Ware Creek veto, see *James City County v. EPA*, 12 F.3d 1330 (4th Cir. 1993), discussed in *EPA Wins Major Wetlands Victory As Court Backs Veto Call*, INSIDE EPA, Jan. 7, 1994, at 1. For a list of 12 EPA vetoes issued through early 1992, see William B. Ellis, *Section 404(c): Where Is the Balance?*, 7 NAT. RESOURCES & ENV'T. (ABA) no. 1 at 25, 63-64 (1992); Sanderson & Comer, *supra*, at 1-18 to 1-20.

137. See Babcock, *supra* note 3, at 332-34 (citing an Office of Technology Assessment study concluding that 90% of permitted wetlands losses were uncompensated in 1983 and only 56% of permits were even field-checked to ascertain compliance with permit conditions; also citing similar results in the state of Washington during 1980-86).

138. *Wetlands Policy Forum*, *supra* note 24, at 42-44.

139. See *supra* note 83 and accompanying text.

140. Memorandum of Agreement Between EPA and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210 (1990), reprinted in WETLANDS DESKBOOK, *supra* note 3, at 331-36. See generally FOCUS ISSUE, NAT'L WETLANDS NEWSL., *supra* note 40; Zallen, *supra* note 136; Hanson, *supra* note 130, at 6-21 to 6-25.

141. Mitigation MOA, *supra* note 140, § II.C; see *supra* notes 40, 46 and accompanying text.

142. Mitigation MOA, *supra* note 140, § III.B, n.7.

143. See Babcock, *supra* note 3, at 338-40.

Other wetlands could satisfy mitigation requirements through compensation, while a general permit would authorize discharges in wetlands categorized as "low value," and states with less than a one percent wetlands loss (Alaska) need only minimize impacts to satisfy mitigation requirements.<sup>144</sup>

The environmental community reacted with alarm to this effort to categorize wetlands according to value. Environmentalists claimed that it was inconsistent with the President's goal of "no net loss" of wetlands, that it was scientifically impossible to fit all wetlands into three types of categories,<sup>145</sup> and that categorization would quickly overwhelm the regulatory process by creating an incentive for developers to hire consultants who would claim particular wetlands were of low value.<sup>146</sup> Categorization would be time consuming and expensive because it could be determined only in relation to other wetlands in a geographic area. The value of wetlands might also vary considerably over time depending on adjacent developments or phenomena such as droughts and floods.<sup>147</sup> For these reasons, environmentalists strenuously resisted efforts at categorization of wetlands.<sup>148</sup>

The Clinton wetlands plan responded to the struggle over the nature of the mitigation required by the 404(b) guidelines by rejecting categorization, for the most part. The plan concluded that despite the conceptual attraction of categorization and ranking according to value, it would prove to be technically, fiscally, and environmentally unworkable.<sup>149</sup> For example, the plan estimated that just mapping all the wetlands in the contiguous United States would cost \$500,000,000, and assessing wetlands functions would cost considerably more.<sup>150</sup> Moreover, the plan recognized the key fact that categorization focusing only on wetlands values ignores the individual impacts associated with specific projects; categorization would countenance wetlands losses for projects that could easily take place on uplands, while denying other projects with no alternatives and small impacts.<sup>151</sup> In short, a sound wetlands protection

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144. Bush 1991 Plan, at 6, reprinted in WETLANDS DESKBOOK, *supra* note 3, at 479.

145. See Oliver A. Houck, *An Open Letter to EPA Administrator William K. Reilly*, NAT'L WETLANDS NEWSL., July/Aug. 1991, at 3 ("there is no way that the Almighty Himself could 'classify' Louisiana").

146. See Searchinger, *supra* note 34, at 38.

147. *Id.*

148. See James T.B. Tripp, *Intended for Restoration Purposes Only*, NAT'L WETLANDS NEWSL., Sept./Oct. 1991, at 9 (endorsing categorization only to determine wetlands restoration priorities).

149. *Clinton Wetlands Plan*, *supra* note 1, at 12.

150. *Id.*

151. *Id.* at 13.

policy must consider the value of the wetlands, the value of the project, and the availability of reasonable alternatives.

Although it wisely rejected categorization, the Clinton plan suggested that state and local plans might be used "to provide landowners with early identification and characterization of wetlands on their property, streamlined permit review, and more flexible mitigation sequencing where appropriate."<sup>152</sup> Other than saving federal dollars, it is hard to understand why state and local categorization do not suffer from the same deficiencies as federal categorization.

As another response to the mitigation controversy, the Clinton plan promised increased "flexibility" in the application of the 404(b) guidelines, so that small projects with minor impacts would be subject to "less rigorous" permit review.<sup>153</sup> Consistent with this promise, on August 23, 1993, the Corps issued a regulatory guidance letter stressing the flexibility inherent in the guidelines.<sup>154</sup> The guidance emphasized that the level of scrutiny the 404(b) guidelines require depends on: (1) a project's environmental impact, which is a product both of the effect on the aquatic resource and nature of the proposed activity, and (2) "the scope/cost of the project."<sup>155</sup> Thus, projects with "minor" individual or cumulative environmental impacts may not be subject to requirements of compensatory mitigation.<sup>156</sup> The danger in exempting "minor" projects from compensation requirements is that it may encourage widespread loss of small urban wetlands and consequent loss of open space, recreation, and wildlife in developed areas. Further, the Corps' guidance suggested that while the scope of alternatives considered to be "practicable" is primarily a function of the type of project, a relevant consideration is what constitutes a "reasonable expense" for the particular applicant: "Therefore, to the extent that individual homeowners and small businesses may be typically associated with small projects with minor impacts, the nature of the applicant may also be a relevant consideration in determining what constitutes a practicable alternative."<sup>157</sup> Even though the guidance did stress that the impact of a project is the primary consideration for determining the scope of alternatives that are practicable,<sup>158</sup> the financial standing of an

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152. *Id.* at 14.

153. *Id.* at 13-14.

154. RGL 93-2, 58 Fed. Reg. 47,719 (1993).

155. 58 Fed. Reg. 47,720 (1993).

156. *Id.* ("In the cases of negligible or trivial impacts . . . it may not be necessary to conduct an offsite alternatives analysis but instead require only any practicable onsite minimization").

157. *Id.* at 47,721.

158. *Id.*



applicant should bear no relationship to the Clean Water Act's goal of preserving the biological and physical integrity of the nation's waters.<sup>159</sup>

### F. Endorsing Mitigation Banking

Mitigation banking is a kind of transferable development right program that enables a developer to create, restore, or enhance wetlands to compensate for future projects that will destroy other wetlands.<sup>160</sup> The Bush Administration endorsed mitigation banking in its 1991 wetlands plan,<sup>161</sup> and a number of mitigation banks have been established, mostly by large developers and state highway departments.<sup>162</sup> Congress also embraced wetlands mitigation banking when the Intermodal Surface Transportation Efficiency Act of 1991 authorized use of federal-aid highway funds to establish banks for use by state highway departments.<sup>163</sup>

Developers have long advocated the use of mitigation banks to add flexibility to wetlands permitting. They claim that banks will provide high value, low cost wetlands for mitigation and will encourage creation of large wetlands areas that have a higher success rate and are easier to monitor than smaller projects. They further

159. 33 U.S.C. § 1251(a). As another element in its effort to increase "flexibility" in 404 decision making, the Clinton plan endorsed the 1992 404(q) memoranda of agreement which made it significantly more difficult for other federal agencies to administratively appeal Corps 404 permit decisions. *Clinton Wetlands Plan*, *supra* note 1, at 19-20; see Terry Schley & Linda Winter, *New 404(q) MOA: Diluting EPA's Role*, NAT'L WETLANDS NEWSL., Nov./Dec. 1992, at 8; David L. Magney & Kenneth M. Bogdan, *What Are ARNIs?*, NAT'L WETLANDS NEWSL., May/June 1993, at 4 (discussing "aquatic resources of national significance" (ARNIs); under the 1992 404(q) MOA, EPA can only administratively appeal Corps permit decisions that will have a "substantial and unacceptable impact" on an ARNI). For background on § 404(q) and the memoranda of agreement that provision requires to speed permit processing, see Michael C. Blumm, *The Clean Water Act's Section 404 Permit Program Enters Its Adolescence: An Institutional and Programmatic Perspective*, 8 ECOLOGY L.Q. 409, 443-45 (1980).

160. See *Focus Issue: Wetlands Mitigation Banking*, Jan./Feb. 1992; Robert D. Sokolove & Pamela D. Huang, *Privatization of Wetlands Mitigation Banking*, 7 NAT. RESOURCES & ENVT. (ABA) no. 1, at 36 (1992); ENVTL. L. INST., *Wetlands Mitigation Banking* (1993).

161. See Bush 1991 Plan, reprinted in WETLANDS DESKBOOK, *supra* note 3, at 478-79.

162. See Lindell L. March & Dennis R. Acker, *Mitigation Banking on a Wider Plan*, NAT'L WETLANDS NEWSL., Jan./Feb. 1992, at 8 (discussing banks established by the Ports of Los Angeles and Astoria, Oregon, by the Irvine Land Development Company, by Tenneco Oil Company, by the San Diego Metropolitan Sewer District, and by the Minnesota and North Dakota highway departments); Robert Anderson & Robert De Caprio, *Banking on the Bayou*, NAT'L WETLANDS NEWSL., Jan./Feb. 1992, at 10 (case study of Tenneco's LaTerre mitigation bank); Wisconsin, *U.S. Agree to Wetlands Mitigation Banking Guidelines*, Env'tl. Policy Alert (Env'tl. L. Inst.), Jan. 5, 1994 (discussing a Wisconsin program to establish five mitigation banking sites to facilitate highway construction in the state).

163. Pub. L. No. 102-240, § 1006(d)(13), 105 Stat. 1914, 1926 (1991); see also H.R. Conf. Rep. No. 102-404, 102d Cong., 1st Sess. 305 (1991), which explains that the 1991 statute will fund only mitigation projects that comply with the 404(b) guidelines and other federal laws and regulations.

claim success is ensured because mitigation is required in advance of development and because creation and management responsibilities are assigned to the bank rather than the developer.<sup>164</sup>

Environmentalists have been wary of wetlands banking, claiming that it encourages: (1) off site mitigation that cannot replace many wetlands values which are site specific; (2) an excess of certain kinds of wetlands, such as marshes and shrub wetlands, because they are easier and cheaper to create than other wetlands types; and (3) issuance of fill permits based on wetlands creation when avoidance and minimization alternatives exist.<sup>165</sup> Some of the environmentalists' concerns are not unique to banks; they pertain to the woeful state of compensatory mitigation generally. For example, one study in Florida indicated that only about one-quarter of projects undertaking compensatory mitigation successfully produced functional wetlands.<sup>166</sup> Worse, more than one-third of the projects requiring compensatory mitigation as a permit condition failed even to attempt compensation, and six in ten failed to satisfy the permit conditions.<sup>167</sup> With such a sorry success rate, a mitigation banking program that requires compensation in advance and relieves developers of creation, restoration, and management responsibilities appears to be an attractive alternative.

The Clinton plan endorsed mitigation banking wholeheartedly, but subjected its use to two conditions. First, the plan made satisfaction of mitigation sequencing required by the Mitigation Memorandum of Agreement<sup>168</sup> a prerequisite to banking.<sup>169</sup> Second, the plan required that mitigation be established before permit issuance.<sup>170</sup> The Corps' interim guidance issued concurrently with the Clinton plan emphasized the availability of banking credits only after a demonstration that impacts associated with a project have been avoided and minimized "to the extent practicable," and required mitigation banks "generally" to be in place before banked credits could be used to offset wetlands losses.<sup>171</sup> The guidance

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164. See Jon Kusler, *The Mitigation Banking Debate*, NAT'L WETLANDS NEWSL., Jan./Feb. 1992, at 4.

165. *Id.*

166. Ann Redmond, *How Successful Is Mitigation?*, NAT'L WETLANDS NEWSL., Jan./Feb. 1992, at 5.

167. Roy R. Lewis, *Why Florida Needs Mitigation Banking*, NAT'L WETLANDS NEWSL., Jan./Feb. 1992, at 7. See also *supra* note 137.

168. See *supra* notes 140-42 and accompanying text.

169. *Clinton Wetlands Plan*, *supra* note 1, at 16-17.

170. *Id.* at 17.

171. RGL 93-2, 58 Fed. Reg. 47,719, 47,721 §§ 3, 5 (1993). The guidance did indicate that there may be some exceptions to the requirement of functional compensation in advance of wetlands losses. *Id.* § 5.

stressed that bank sites should generally be in the same watershed as the wetlands losses, required formal written agreements with federal authorities to establish banks, and encouraged the establishment of private banks.<sup>172</sup> All use of bank credits must be authorized and enforced by the 404 permit process.<sup>173</sup>

Widespread use of mitigation banking will certainly add flexibility, long sought by developers, to wetlands regulation. If it is not employed to undermine the 404(b) guidelines' policy of favoring avoidance and minimization of impacts over compensation for wetlands losses, banking can also produce wetlands preservation benefits by bringing third party expertise to wetlands creation, restoration, and management. Well operated banks could relieve overburdened regulators from overseeing mitigation projects,<sup>174</sup> and could foster the Clinton plan's goal of increasing the quantity and quality of the nation's wetlands<sup>175</sup> by (1) establishing greater than 1:1 ratios of credit acreage to lost acreage, and (2) focusing primarily on restoring wetlands such as those converted to farm land, rather than relying on the uncertain science of wetlands creation.<sup>176</sup> The devil will be in the details.

#### IV. INCREASING STATE AND LOCAL RESPONSIBILITIES

The Clinton plan reflected a decided emphasis to increase state and local responsibilities in wetlands regulation. It is perhaps not surprising that an Administration headed by a former governor would seek more state and local control,<sup>177</sup> but it is this aspect of the Clinton plan that arguably transforms what otherwise would be a plan with a precarious balance between development and protection into one that likely will not meet its goals. The emphasis on state and local responsibility will not easily achieve the Administration's short-term goal of no net wetlands loss, nor is it likely to achieve the

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172. 58 Fed. Reg. at 47,721-22 (§§ 4, 6, 8); see Sokolove & Huang, *supra* note 160, at 68-69. The first private mitigation bank in Florida, "Florida Wetlandsbank," was approved by the Corps on August 3, 1993. The bank's first approved site is a 345-acre freshwater wetlands owned by the City of Pembroke Pines in Broward County in need of restoration. See 24 *Env't Rep.* (BNA) 603 (1993).

173. 58 Fed. Reg. at 47,722 (§§ 8-9).

174. See Lewis, *supra* note 167, at 7 (program funding and management are "woefully inadequate").

175. Clinton Wetlands Plan, *supra* note 1, at 4.

176. See, e.g., Searchinger, *supra* note 34, at 39-40.

177. See, e.g., *Administration Proposes Full Delegation of Superfund to States*, INSIDE EPA, Jan. 7, 1994, at 1; see also *Governors in Concert*, NAT'L WETLANDS NEWSL., July/Aug. 1992, at 4 (National Governors' Association wetlands policy statement).

plan's long-term goal of increasing the quantity and quality of the nation's wetlands.<sup>178</sup>

State wetlands regulation will produce less effective wetlands protection than federal regulation. The public benefits wetlands confer, such as filtering out pollutants, storing flood waters, and supplying essential parts of the aquatic food chain, often extend well beyond state boundaries.<sup>179</sup> States have less incentive to preserve wetlands because they must share these economic and environmental benefits with adjacent and distant states. On the other hand, most of the economic benefits of development in wetlands remain within a state. Moreover, local developers often have considerable influence over state officials worried about campaign contributions, tax bases, and job creation.<sup>180</sup> Federal administrative officials are more insulated from these pressures and better positioned to evaluate the long-term, interstate benefits conferred by wetlands.

It is true that some states may provide adequate wetlands protection, but the interstate nature of wetlands benefits, coupled with the local nature of development benefits, means that federal, rather than state, regulation will almost always provide more effective long-term protection for wetlands. States wishing to provide greater wetlands protection than the federal program may do so, and the federal program will defer to the state.<sup>181</sup> States also have an effective veto over federal wetlands permits through the state certification process established under section 401 of the Clean Water Act and section 307(c) of the Coastal Zone Management Act.<sup>182</sup> With these mechanisms at their disposal, states already have sufficient authority to protect wetlands; allowing states to displace 404

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178. See *supra* note 82 and accompanying text.

179. Lance D. Wood, *Section 404: Federal Wetlands Regulation Is Essential*, 7 NAT. RESOURCES & ENVTL. L.(ABA) no. 1, at 7, 11 (1992).

180. *Id.*

181. Section 510(a) of the Clean Water Act allows states to enact more stringent programs than the federal program. 33 U.S.C. § 1371(a).

182. Section 401 of the Clean Water Act requires applicants for federal licenses or permits resulting in discharges into the nation's waters to obtain a water quality certification from the state. 33 U.S.C. § 1341, 33 C.F.R. § 320.3(a); U.S. Environmental Protection Agency, Office of Water, *Wetlands and 401 Certification* (Apr. 1989); see Katherine Ransel & Eric Meyers, *State Water Quality Certification and Wetlands Protection: A Call to Awaken a Sleeping Giant*, 7 VA. J. NAT. RESOURCES L. 339 (1988); Parthenia B. Evans, *State Water Quality Certifications in Section 404 Permitting*, 7 NAT. RESOURCES & ENVTL. L. (ABA) no. 1 at 22 (1992). Section 307(c) of the Coastal Zone Management Act requires federally licensed and permitted activities affecting land or water uses in a state's coastal zone to furnish certification that the proposed activity will be consistent with the state's coastal zone management program. 16 U.S.C. § 1456(c), 33 C.F.R. § 320.3(b). See Michael C. Blumm & John B. Noble, *The Promise of Federal Consistency Under Section 307 of the Coastal Zone Management Act*, 6 ENVTL. L. REP. (Envil. L. Inst.) 50,047 (1976).

regulation would almost certainly result in greater wetlands development.<sup>183</sup>

### A. Promoting State 404 Programs

The Clean Water Act authorizes states to issue 404 permits in traditionally non-navigable waters if EPA approves their programs.<sup>184</sup> State programs must have authority to issue permits that are subject to the same requirements and conditions as the federal program, including compliance with the 404(b) guidelines.<sup>185</sup> State programs must also have authority over all activities producing discharges of dredged or fill material into traditionally non-navigable waters in the state, as EPA will not approve partial state programs.<sup>186</sup> The prohibition on partial state approvals is designed to decrease complexity in 404 regulation, allowing the public to rely on state regulation of certain wetlands regardless of the type of discharge. In part because of the prohibition on partial 404 program approvals, only Michigan and New Jersey have obtained 404 program approval.<sup>187</sup>

Echoing the 1988 National Wetlands Policy Forum,<sup>188</sup> the Clinton plan aimed to encourage more state 404 program approvals by asking Congress to authorize partial state program approvals.<sup>189</sup> The plan also asked Congress to authorize the use of federal grant money for the development and implementation of state programs.<sup>190</sup>

How partial approval of state programs will serve the Clinton plan's goal of "increas[ing] consistency and clarity and reduc[ing] the confusion" between the federal and state 404 roles<sup>191</sup> remains a

183. See Lance D. Wood, *The Forum's Proposal to Delegate § 404 to the States: A Bad Deal for Wetlands*, NAT'L WETLANDS NEWSL., July/Aug. 1989, at 2, 4; see also Lance D. Wood, *Section 404 Delegation: A Rebuttal to Governor Kean*, NAT'L WETLANDS NEWSL., Jan./Feb. 1990, at 2, responding to Governor Thomas Kean, *A Reply to Mr. Wood*, NAT'L WETLANDS NEWSL., Nov./Dec. 1989, at 2.

184. 33 U.S.C. § 1344(g)-(h); see Strand, *supra* note 3, at 10,315-16.

185. 33 U.S.C. § 1344(g)(1); see 40 C.F.R. § 233.10-15.

186. 40 C.F.R. § 233.1(b). States need not, however, have authority over Indian lands, and states may decline to exercise jurisdiction over activities authorized by existing federal general permits.

187. See 40 C.F.R. § 233.60; see Peg Bostick, *Michigan Section 404 Program Update*, NAT'L WETLANDS NEWSL., July/Aug. 1989, at 5; Stephen Brown, *Michigan: An Experiment in Section 404 Assumption*, NAT'L WETLANDS NEWSL., July/Aug. 1989, at 5. New Jersey became the second approved 404 program state in late 1993. See *Envtl. Policy Alert* (Envtl. L. Inst.), Dec. 22, 1993, at 13; 58 Fed. Reg. 36,958 (1993) (announcing the state's completed request for program approval).

188. See *Wetlands Policy Forum*, *supra* note 24, at 5-6, 21-23.

189. *Clinton Wetlands Plan*, *supra* note 1, at 21.

190. *Id.*

191. *Id.* at 20.

mystery. Actually, partial program approvals would produce a crazy-quilt of fragmented jurisdiction, with some states regulating only certain types of discharges in certain types of waters, leaving the rest for federal regulation. So long as EPA retains a veto over state-issued permits,<sup>192</sup> however, the price of partial state programs can be limited to increased complexity and public confusion. EPA can still disapprove grossly inconsistent wetlands regulation.<sup>193</sup> The same cannot be said of state program general permits.

### B. Expanding Program General Permits

If it is true that the wetlands permit program "lies like an open wound across the body of environmental law,"<sup>194</sup> most of the bleeding emanates from the Corps' general permit program. General permits authorize discharges by regulation, obviating the need to obtain an individual permit, so long as certain conditions are satisfied.<sup>195</sup> Congress ratified the use of general permits on a "state, regional, or nationwide basis" in 1977, to reduce the administrative burden of regulating all the nation's waters.<sup>196</sup> Two of the most controversial general permits are nationwide permit 26, discussed in section C,<sup>197</sup> and state program general permits, discussed below.

Although the Clean Water Act, in sections 404(g) and (h), contains elaborate provisions establishing an approval process and federal oversight for state 404 programs, for some years the Corps has used its authority under section 404(e) to issue general permits on a statewide level to defer to state and local regulation. In effect, this initiative circumvented the statute's state program approval requirements.<sup>198</sup> Unlike state 404 permits, program general permits

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192. 33 U.S.C. § 1344(j). *But see infra* note 269 (discussing the Graham bill, which would eliminate EPA's veto authority).

193. EPA vetoes are infrequent, however. In one case involving the Homestead Resort on Michigan's Crystal River, a veto decision by EPA's regional office was overturned by EPA headquarters. *See Friends of Crystal River v. EPA*, No. 1:92:CV:325, 1992 WL 142240 (W.D. Mich. June 9, 1992) (ruling that because the time limits in § 404(j) of the Clean Water Act had been exceeded, EPA headquarters could no longer decide that the state could issue the permit because the Corps obtained jurisdiction under § 404(j)). *See generally* Scott Jones, *Future Seen in Crystal River*, NAT'L WETLANDS NEWSL., Mar./Apr. 1992, at 12; Stephen Rideout, *Defining EPA Oversight*, NAT'L WETLANDS NEWSL., Sept./Oct. 1992, at 9; Robert G. Dreher, *EPA Recants Role in Federal Oversight*, NAT'L WETLANDS NEWSL., Sept./Oct. 1992, at 10.

194. Houck, *supra* note 128, at 773.

195. *See* Strand, *supra* note 3, 10,210-14.

196. *See* Blumm & Zaleha, *supra* note 2, at 725. The Corps had issued its first nationwide permit regulations prior to the 1977 Amendments to the Clean Water Act, which endorsed the concept in section 404(e). 33 U.S.C. § 1344(e). *See* 42 Fed. Reg. 37,121, 37,145 (1977).

197. *See infra* part IV. C.

198. 33 U.S.C. § 1344(e)(1) (general permits); (g), (h) (state programs); *see* Remarks of John Echeverria, Counsel to the National Audubon Society, at the Rocky Mountain Mineral Law

are not issued under an EPA-approved program and are not subject to EPA veto. The statute restricts general permits to activities that are "similar in nature, [causing] only minimal adverse environmental impacts when performed separately, and [having] only minimal cumulative adverse effect on the environment."<sup>199</sup> But the Corps neither restricts program general permits to activities that are similar in nature, nor requires permittees to supply information on their activities necessary to make a finding concerning cumulative impacts.

The Clinton plan endorsed state program general permits, along with tribal, regional, and local program permits.<sup>200</sup> The plan called upon the Corps to issue guidance clarifying the circumstances under which these programs could regulate 404 activities while specifying "safeguards" required to protect wetlands.<sup>201</sup> What those safeguards may be remains unclear.

The plan's support of program general permits is related to its endorsement of state and local comprehensive watershed planning to which the 404 permit process would defer.<sup>202</sup> The ideal of having a state or local comprehensive planning process that would obviate case-by-case 404 permitting has been a long-standing hope of those burdened by section 404(b) alternative analysis requirements.<sup>203</sup> The Corps supports such efforts,<sup>204</sup> as it has done for some time.<sup>205</sup> Comprehensive plans can identify wetlands according to function and value, which may assist in making regulatory decisions. The wetlands permit process, however, focuses not only on the value of the wetlands but on the nature of the activity, especially on whether

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Foundation's Conference on Wetlands Resources Development in the Western United States (Nov. 19, 1993). On 404 state program requirements, see Blumm, *supra* note 159, at 454-60.

199. 33 U.S.C. § 1344(e)(1); see 33 C.F.R. §§ 322.2(e) (Corps regulation amending the statutory language to "substantially similar in nature"); 325.5(c)(3) (stating that program general permits are designed to avoid duplication with other regulatory programs). For a good overview of nationwide general permits, see John M. Brink, *Nationwide Permits in WETLANDS ISSUES IN RESOURCES DEVELOPMENT*, *supra* note 3, paper 4; see also Susan Tomasky, *New Discretion an Open Question*, NAT'L WETLANDS NEWSL., Mar./Apr. 1992, at 10 (discussing the 1991 regulatory amendments to the Corps' general permit program).

200. *Clinton Wetlands Plan*, *supra* note 1, at 21.

201. *Id.*

202. See *id.* at 8-9.

203. See, e.g., Michael C. Blumm, *Wetlands Protection and Coastal Planning: Avoiding the Perils of Positive Consistency*, 5 COLUM. J. ENVTL. L. 69, 71-72 (1978) (describing attempts to use coastal zone plans to supplant 404 regulation).

204. See RGL No. 92-3, 58 Fed. Reg. 17,219 (current guidance on "special area management plans," first issued in 1986).

205. See John F. Studt, *Special Area Management Plans in the Army Corps of Engineers Regulatory Program*, NAT'L WETLANDS NEWSL., May/June 1987, at 8.

that activity must take place in wetlands.<sup>206</sup> Planning processes, regardless of how comprehensive, seldom focus on particular development activities; thus, plans cannot serve as a substitute for case-by-case permitting because the alternatives analysis that is central to 404 regulation depends on a specific development proposal.<sup>207</sup> Consequently, the Clinton plan's suggestion that state and local watershed planning can serve as a basis for program general permits reflects a fundamentally flawed understanding of the relationship between planning and permitting. Moreover, the concept of authorizing 404 permits on the basis of *local* planning processes without EPA veto makes environmentalists cringe<sup>208</sup> because the concentrated nature of economic benefits from wetlands development (as opposed to the diffused nature of economic benefits from wetlands preservation)<sup>209</sup> is even more evident at the level of local regulation.

### C. Curbing the Excesses of Nationwide Permit 26

The most notorious of the Corps' general permits is nationwide permit 26 (NWP 26), which authorizes discharges affecting fewer than ten acres above the "headwaters" of streams. These are nontidal waters with an average annual flow of less than five cubic feet per second, or in "isolated" waters, nontidal waters that are neither part of a surface water system nor adjacent to such a system.<sup>210</sup> NWP 26 was promulgated over EPA objection in 1982.<sup>211</sup> After the Corps attempted to broaden its applicability in the early 1980s, changes due to a lawsuit settlement required that those using NWP 26 to fill more than one acre supply a predischarge notification to the Corps.<sup>212</sup> 1991 revisions to the nationwide permit program gave the Corps more

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206. 40 C.F.R. § 230.10(a); see *Clinton Wetlands Plan*, *supra* note 1, at 13, discussed *supra* text accompanying note 151, where the Clinton plan seems to recognize the statement in the text above.

207. See generally Houck, *supra* note 128.

208. See, e.g., remarks of John Echeverria, *supra* note 198.

209. See *supra* notes 179-183 and accompanying text.

210. 33 C.F.R. § 330.2(d), (e); see Jan Goldman-Carter, *Nationwide Permit 26: The Wetlands Giveaway*, NAT'L WETLANDS NEWSL., Nov./Dec. 1989, at 4, 5 (describing NWP as a "virtual black hole for wetlands"); Thomas Addison & Timothy Burns, *The Army Corps of Engineers and Nationwide Permit 26: Wetlands Protection or Swamp Reclamation?*, 18 ECOLOGY L.Q. 619 (1991) (comprehensive evaluation of the evolution, design, and implementation of NWP 26).

211. See Letter of William N. Hedeman, Jr. to Major General E.R. Heiberg III (Dec. 31, 1980), quoted in Eric W. Nagle, *National Wetlands Protection and the Neglected Stepchild of the Clean Water Act: A Proposal for Shared Custody of Section 404*, 5 VA. J. NAT. RESOURCES L. 227, 247 (1985) (claiming that "issuance of nationwide permits for classes of waters, in addition to categories of activities, has no statutory basis and is inconsistent with Congressional intent").

212. See Strand, *supra* note 3, at 10,212-13; Theis, *supra* note 21, at 20 (discussing National Wildlife Fed'n v. Marsh, 14 ENVTL. L. REP. (Env'tl. L. Inst.) 20,261 (D.D.C. 1984)).



flexibility to modify, suspend, or revoke nationwide permits for certain activities,<sup>213</sup> and a wetlands delineation is now required along with pre-discharge notification for fills over one acre.<sup>214</sup>

NWP 26 has been justified by the Corps on the grounds that the 404 program would collapse under the burden of permit applications for numerous small wetlands fills.<sup>215</sup> The result is that isolated wetlands and headwaters streams are substantially unprotected.<sup>216</sup> For example, under NWP 26, whole hardwood forests have been drained to make way for pine plantations in the Southeast,<sup>217</sup> and significant wetlands losses have been authorized in the Platte and Sacramento River Basins.<sup>218</sup> The damage wrought by NWP 26 has never been estimated,<sup>219</sup> which arguably is a violation of the statutory requirement that the Corps restrict the use of general permits to activities causing minimal cumulative adverse environmental impacts.<sup>220</sup> Moreover, the Corps engages in another seeming statutory violation by making no attempt to assure that the activities authorized by NWP 26 are "similar in nature."<sup>221</sup>

Although the Corps appeared to ignore widespread criticism of NWP 26 when it reissued its nationwide permits in 1991,<sup>222</sup> the Clinton wetlands plan promised a Corps "field level review and evaluation" of NWP 26.<sup>223</sup> The purpose of this review is to regionalize NWP 26 to make it sensitive to local conditions.<sup>224</sup> This regionalization might allow for exclusion of locally significant wetlands resources, such as vernal pools in California and prairie

213. 33 C.F.R. § 330.4(3).

214. *Id.* § 330, App. A § 26.b. Residential subdivisions where the aggregate loss exceeds ten acres are not eligible for NWP 26, unless the Corps' district engineer determines that the loss is minimal and substantial resources had been committed in reliance on NWP 26 prior to January 21, 1992. *Id.* § 26.c.

215. See Bernard N. Goode, In Defense of Nationwide Permit 26, NAT'L WETLANDS NEWSL., Nov./Dec. 1989, at 4; *Clinton Plan May Yield Stronger "Isolated" Wetlands Protection*, INSIDE EPA, Oct. 29, 1993, at 14-15.

216. See Addison & Burns, *supra* note 210, at 643-49, 660-62 (poor information on the value of wetlands lost under NWP 26, poor monitoring, lack of enforcement, little or no mitigation create incentives for noncompliance).

217. INSIDE EPA, *supra* note 215; Goldman-Carter, *supra* note 210, at 6.

218. See Douglas N. Gladwick & James E. Roelle, *Case Studies Highlight Concerns*, NAT'L WETLANDS NEWSL., Mar./Apr. 1992, at 7-9 (at least 172 wetlands acres destroyed pursuant to NWP 26 in the Platte River Basin during 1985-89, and at least 72 acres in the Sacramento River Basin destroyed during the same period).

219. See Addison & Burns, *supra* note 210, at 638-40 (summarizing some regional studies).

220. 33 U.S.C. § 1344(e)(1).

221. *Id.*; see *supra* note 211; Goldman-Carter, *supra* note 210, at 5.

222. See 56 Fed. Regs. 59,110, 59,125-26 (1991) (summarizing public comments on NWP 26).

223. *Clinton Wetlands Plan*, *supra* note 1, at 14.

224. See *id.*

potholes in the Midwest, from development under the authority of NWP 26.<sup>225</sup> On the other hand, it might also enable Alaska to take greater advantage of NWP 26 by expanding the applicable category of waters.<sup>226</sup> Regionalizing NWP 26 might be one of the most significant wetlands protection provisions in the Clinton plan, but its significance will depend on the results of the Corps' field study. The plan recommended that Congress amend section 404(e) to authorize the concept of general permits based on regional categories of waters,<sup>227</sup> which might be interpreted as a tacit admission that the current NWP 26 is illegal.<sup>228</sup>

#### V. PROMOTING VOLUNTARY WETLANDS PROTECTION

Anyone who has studied the difficulty of implementing effective wetlands regulation, and who recognizes that three-quarters of the remaining wetlands in the contiguous United States are privately owned, has wished that the need for regulation would disappear, and that the invisible hand of the market would supply incentives for private owners to protect wetlands. The shortcomings that inhibit effective state regulation of wetlands<sup>229</sup> are even more disabling in the case of voluntary programs: the benefits of wetlands development are concentrated on the developer, while the costs are spread to adjacent and downstream lands and waters. Thus, wetlands owners have strong economic incentives to destroy wetlands.

When the 1988 National Wetlands Policy Forum recommended adoption of a long-term national goal of increasing the quantity and quality of the nation's wetlands, it endorsed a variety of non-regulatory mechanisms, such as increased governmental incentives to wetlands owners, to preserve wetlands.<sup>230</sup> In response, Congress in 1990 expanded the "conservation reserve" program under the Food Security Act.<sup>231</sup> This program authorized annual rental payments to farmers who entered into federal contracts to remove highly erodible land from agricultural production.<sup>232</sup> The expanded program included a "wetlands reserve," and wetlands considered either "farmed wetlands" or "converted wetlands"<sup>233</sup> can now become

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225. See *INSIDE EPA*, *supra* note 215, at 15.

226. See *Clinton Wetlands Plan*, *supra* note 1, at 24.

227. *Id.* at 14.

228. See *supra* notes 210, 220-21 and accompanying text.

229. See *supra* notes 179-183 and accompanying text.

230. See *Wetlands Policy Forum*, *supra* note 24, at 3-4, 27-33, 49-55.

231. 16 U.S.C. § 3837; 7 C.F.R. § 703.

232. See *Strand*, *supra* note 3, at 10,357; *Malone*, *supra* note 21, at 585-87; *Johnson*, *supra* note 21, at 314-18; *Lant*, *supra* note 93.

233. See *supra* note 96 and accompanying text.

part of the reserve if the Agricultural Stabilization and Conservation Service determines that the wetlands can be successfully restored.<sup>234</sup> Wetlands reserve properties are subject to thirty-year nondevelopment easements and must have wetlands conservation plans approved by the Service.<sup>235</sup> Landowners who violate the conditions of the plans may have to return funds received for the easements.<sup>236</sup>

Not surprisingly, the Clinton wetlands plan called for more volunteerism<sup>237</sup> and singled out the wetlands reserve program as particularly successful.<sup>238</sup> The plan noted that the response of farmers to the program was ten times larger than their response to the 50,000 acre pilot program funded before 1993. The plan further advocated full funding of the Administration's budget requests to Congress.<sup>239</sup>

Because the wetlands regulatory program countenances hundreds of thousands of acres of wetlands loss each year,<sup>240</sup> the only realistic hope for achieving the interim national goal of "no net loss" (to say nothing of the long-term goal of increasing the quality and quantity of the nation's wetlands) is to promote voluntary wetlands conservation efforts.<sup>241</sup> It must be emphasized, however, that volunteerism is no substitute for effective regulation, and that effective voluntary programs are expensive.<sup>242</sup>

## VI. SUGGESTING CONGRESSIONAL REFORMS

The Clinton wetlands plan included a number of legislative proposals to Congress, which has Clean Water Act reauthorization on its agenda for 1994. Sprinkled throughout the plan were recommendations to Congress, some predictable, some curious. As mentioned in the previous section,<sup>243</sup> the Clinton plan recommended increased

234. 16 U.S.C. § 3837(c).

235. *Id.* § 3837(a).

236. *Id.* § 3837(g). However, farmers who lose agricultural benefits by violating the swampbuster provisions (which prohibit draining or filling of wetlands) remain eligible for wetlands reserve payments. Strand, *supra* note 3, at 10,358.

237. Clinton Wetlands Plan, *supra* note 1, at 7, 9, 18-19.

238. *Id.* at 12.

239. *Id.* at 12, 18 (citing proposals for 250,000 and 500,000 acres of wetlands restoration from over 2300 farmers in two different pilot programs).

240. See *supra* note 19 and accompanying text.

241. See, e.g., Greg Low, *Virginia Coast Reserve*, NAT'L WETLANDS NEWSL., Mar./Apr. 1993, at 3; Joel Kuperberg, *Crew Team Plies Uncharted Waters*, NAT'L WETLANDS NEWSL., Mar./Apr. 1993, at 7 (discussing large-scale wetlands acquisition project in South Florida).

242. See United Press Int'l, *FARMING TODAY*, Feb. 8, 1994 (reporting that the Clinton Administration's 1995 budget request recommended \$241,000,000 for the wetlands reserve program, which would allow enrolling 300,000 new acres).

243. See *supra* notes 239, 242 and accompanying text.

funding for the wetlands reserve program.<sup>244</sup> The plan also sought express legislative ratification of wetlands banking, as well as authorization for use of state revolving funds to allow states to capitalize mitigation banks.<sup>245</sup> More curious recommendations were the suggestions that Congress adopt the regulatory definition of "waters of the United States," particularly the recent exemption for "prior converted croplands,"<sup>246</sup> and include in the definition examples of isolated waters, such as prairie potholes, vernal pools, and playa lakes.<sup>247</sup> These were curious recommendations because there is no serious argument that the regulatory definition exceeds congressional intent to regulate all waterbodies to the full extent of the Commerce Clause.<sup>248</sup> Some might accuse the Clinton plan of raising a red flag to Congress, which nearly severely restricted wetlands jurisdiction sixteen years earlier, in 1977.<sup>249</sup> On the other hand, the Clinton plan also suggested congressional endorsement of the recently promulgated *Tulloch* rules,<sup>250</sup> so perhaps the plan was simply recommending congressional ratification of all regulatory assertions of jurisdiction.

Among the most prominent legislative recommendations in the Clinton plan were those aimed at increasing state and local wetlands regulation. The plan sought to encourage watershed planning as a

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244. *Clinton Wetlands Plan*, *supra* note 1, at 12.

245. *Id.* at 9, 17.

246. *See supra* notes 89-103 and accompanying text.

247. *Clinton Wetlands Plan*, *supra* note 1, at 15-16.

248. *See* Blumm & Zaleha, *supra* note 2, at 713-20; *see also* Memorandum from Francis S. Blake, EPA General Counsel, on Clean Water Act Jurisdiction Over Isolated Waters (Sept. 12, 1985), *reprinted in* WETLANDS DESKBOOK, *supra* note 3, at 462 (potential use of waters by migratory birds is a sufficient basis for Clean Water Act jurisdiction). The court in *Tabb Lakes Ltd. v. United States*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 20,008 (4th Cir. 1989) ruled that the Corps could not use the Corps' adoption of Blake memorandum as a basis for Clean Water Act jurisdiction because it had not been promulgated under the notice and comment procedures required by the Administrative Procedure Act. The Corps and EPA do not follow the *Tabb Lakes* ruling outside the Fourth Circuit, *see* Want, *supra* note 3, § 4.05[5], and the Ninth Circuit has issued a contrary ruling in *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1089 (1991). Moreover, the *Tabb Lakes* decision can be reversed by administrative action; congressional action is not necessary. Another decision seemed to indicate that Commerce Clause jurisdiction could not be based on migratory bird habitat, but that decision was subsequently revoked. *Hoffman Homes v. EPA*, 961 F.2d 1310 (7th Cir. 1992), *reh'g granted*, 975 F.2d 1554 (7th Cir. 1992), *decision on reh'g*, 999 F.2d 256 (7th Cir. 1993) (upholding Clean Water Act jurisdiction based on use of waterbodies by migratory birds but ruling that EPA lacked sufficient evidence to conclude that the isolated wetlands in question was suitable for migratory bird habitat). For a discussion of federal jurisdiction over isolated wetlands prior to the latest *Hoffman Homes* case, *see* Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 27-41 (1993).

249. *See* Wood, *supra* note 179, at 10-11.

250. *Clinton Wetlands Plan*, *supra* note 1, at 23. On the *Tulloch* rules, *see supra* notes 59-81 and accompanying text.

means to increase flexibility in wetlands permitting and asked Congress to specifically authorize watershed plans and the issuance of program general permits based on state, tribal, regional, and local programs.<sup>251</sup> The plan also recommended congressional action authorizing approval of state partial programs under 404 and funding for both the development and implementation of state 404 programs.<sup>252</sup>

The risks that state 404 programs pose to wetlands protection were explained above,<sup>253</sup> but the risks from program general permits, particularly those based on local programs, are considerably greater. With no systematic process for approving activities authorized under program general permits, and with strong local economic incentives to increase developable land,<sup>254</sup> legislative authorization for expanded use of program general permits is likely to produce wetlands loss even greater than that resulting from nationwide permit 26.<sup>255</sup> This attempt to expand program general permits to local programs is likely to be one of the most contentious issues in efforts to reauthorize the Clean Water Act.<sup>256</sup>

The Clinton plan sometimes attempted to protect wetlands by declining to endorse congressional changes, as shown by the following examples. First, the plan declined to endorse "categorization" of wetlands that would effectively zone some wetlands for development. Wetlands developers have sought such an *a priori* categorization that would rank wetlands based on their function and relative importance for some time,<sup>257</sup> but the Clinton plan rejected the idea for a number of sound reasons, including its estimated cost (in excess of \$500,000,000), a lack of scientific basis for ranking functionally distinct wetlands types, and the reality that categorization cannot serve as a substitute for a permit process that considers both the value of wetlands and the value of a development project.<sup>258</sup>

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251. *Clinton Wetlands Plan*, *supra* note 1, at 8-9, 20-21.

252. *Id.* at 21.

253. *See supra* notes 179-183 and accompanying text.

254. *See supra* notes 180, 208-09 and accompanying text.

255. *See supra* notes 216-19 and accompanying text.

256. *See Lack of Local Role in House Wetlands Draft Becomes a Key Debate Point*, INSIDE EPA, Oct. 22, 1993, at 17 (noting that the bill sponsored by House Merchant Marine and Fisheries Committee Chair Gerry Studds falls "far short" of the Clinton Administration's proposals for increasing local involvement in wetlands regulation).

257. *See supra* notes 143-44 and accompanying text. For an overview of the categorization issue, see William E. Taylor & Dennis Magee, *Should All Wetlands Be Subject to the Same Regulation?*, 7 NAT. RESOURCES & ENVTL. L. 32 (ABA) (1992); *Are All Wetlands Created Equal?*, NAT'L WETLANDS NEWSL., Sept./Oct. 1991, at 6-9 (articles by Virginia S. Albrecht, Lyndon C. Lee, and James T.B. Tripp); Houck, *supra* note 145.

258. *Clinton Wetlands Plan*, *supra* note 1, at 12-13. *See supra* note 151 and accompanying text.

Somewhat paradoxically, the Clinton plan encouraged categorization on the state and local level as part of its efforts to encourage watershed planning, greater use of program general permits, and regionalization of nationwide permit 26.<sup>259</sup>

The second important reform that the Clinton plan did not recommend to Congress is Alaska's "one percent" proposal.<sup>260</sup> There are, however, recent signs that the Clinton Administration is having difficulty resisting the state of Alaska's persistent efforts to obtain exemptions from wetlands regulatory requirements.<sup>261</sup>

The third significant exclusion from the Clinton legislative package was its refusal to recommend that Congress characterize permit denials as constitutional takings of private property requiring payment of just compensation.<sup>262</sup> The plan wisely concluded that constitutional takings can only be ascertained on a case-by-case basis and that, consequently, the courts are better situated than Congress to make such a determination.<sup>263</sup> Statutorily required (as opposed to constitutionally required) compensation would undoubtedly prove expensive and would certainly chill wetlands regulation.<sup>264</sup> Moreover, compensating wetlands owners for preserving wetlands assumes that landowners have an inherent property right to develop wetlands, an assumption that American courts have been unwilling to make.<sup>265</sup> Given the recent Supreme Court decision in *Lucas v.*

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259. *Id.* at 13-14. See *supra* notes 202-09 (watershed planning), 200-01, (general permits), 222-28 (regionalization of NWP 26).

260. *Clinton Wetlands Plan*, *supra* note 1, at 24; see *supra* notes 39-58 and accompanying text.

261. See Letter of Feierabend & Turrini, *supra* note 55 (claiming that local regulation of wetlands under program general permits issued in Anchorage and Juneau "is generally an environmental disaster").

262. *Clinton Wetlands Plan*, *supra* note 1, at 24-25.

263. See *id.* at 25. Among the factors that determine whether a constitutional taking has occurred are the size of the property, the regulation's specific economic impact, the history of the parcel's development and regulation, whether development changed when title was transferred, reasonable expectations of neighboring owners under state common law, and the extent of diminution in investment-backed expectations after the passage of the regulation. See *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992); analyzed in Richard J. Grosso & David J. Russ, *Takings Law in Florida: Ramifications of Lucas and Reahard*, 8 J. LAND USE & ENVTL. L. 431, 466-68, 475-80 (1993).

264. For example, the Congressional Budget Office estimated the cost of acquiring "type A" wetlands under the Hayes Bill (H.R. 1330) (those with critical significance to long-term ecosystem conservation, limited to 20% of the wetlands in a county) to be \$15 billion. See James E. Satterfield & Moira McDonald, *Hayes and Edwards Face Off*, NAT'L WETLANDS NEWSL., May/June 1993, at 8.

265. See, e.g., *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972) ("An owner of land has no absolute and unlimited right to change the essential character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."); Blumm & Zaleha, *supra* note 2, at 754-59 (collecting § 404 takings cases).

*South Carolina Coastal Council*,<sup>266</sup> courts are less likely than ever to assume such an inherent property right to develop.

Congress has radically different wetlands bills under consideration,<sup>267</sup> and the Clinton plan's recommendations are likely to prove influential. In fact, the Administration's reauthorization proposal closely parallels a bill sponsored by Florida Senator Bob Graham.<sup>268</sup> Disagreements remain, however, over whether local programs can qualify for program general permits, and whether EPA should retain a veto over state 404 permits.<sup>269</sup> If the Clinton plan is perceived as a

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266. See 112 S. Ct. 2886, 2990 (1993), where Justice Scalia suggested that the per se rule the *Lucas* case established, requiring compensation for regulations depriving landowners of all economic value, would not apply to a situation where the regulation was restraining a "landfilling operation that would have the effect of flooding others' land." Wetlands regulation is often justified on precisely the same ground. See also Fred R. Disheroon, *After Lucas: No More Wetlands Takings?*, 17 VT. L. REV. 683 (1993) (no takings in wetlands regulation because of limited private ownership of waterbodies); Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of Lucas v. South Carolina Coastal Council*, 28 LAND & WATER L. REV. 425, 465 (1993) (§ 404 regulation is generally not a takings because it rarely deprives a landowner of all economically viable use of land and, even then, may be justified as nuisance prevention or vindication of public trust rights inherent in property titles); Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 482 (1989) ("the roots of private property in water have simply never been deep enough to vest water users a compensable right to diminish lakes or rivers or to destroy the marine life within them."); Michael C. Blumm, *Property Myths, Judicial Activism, and the Lucas Case*, 23 ENVTL. L. 907, 916 (1993) (contrasting development property rights with privacy property rights, and arguing only the latter are fundamental rights); *Concrete Pipe Products v. Construction Laborers Pension Trust for California*, 113 S. Ct. 2264, 2291 (1993) (mere diminution in value is insufficient to establish a constitutional taking, citing land use decisions upholding regulations reducing property values by 75% and 92%).

267. For comparisons of the stark contrasts between the Edwards' bill (H.R. 350, sponsored by California Congressman Don Edwards), which is largely supported by the environmental community, and the Hayes bill (H.R. 1330, sponsored by Louisiana Congressman Jimmy Hayes), supported by the regulated community, see Satterfield & McDonald, *supra* note 264, at 6-7; Katherine Howie, *A New Scheme For Wetlands Management?*, 13 WATER LOG NO. 2 (Mississippi-Alabama Sea Grant, 1993). The Edwards bill would, among other things, (1) go beyond the *Tulloch* rules by regulating activities like flooding of wetlands that do not involve a discharge; (2) confine the authorization of the general permit program to "narrowly defined" categories of activities; (3) require pre-discharge notification before any activity may be authorized in a general permit; (4) require written Corps explanations of rejections of federal fish and wildlife agency recommendations; and (5) establish a "fast track team" in each Corps district office to speed processing of permits not disturbing more than one acre and being performed by individuals or businesses employing fewer than ten people. *Id.* For a description of the Hayes bill, see *infra* note 270.

268. See *Clinton CWA Plan Tracks Senate Bill, Boosting Prospects for Passage*, INSIDE EPA, Feb. 4, 1994, at 1.

269. See *Wetlands Loom As Major Sticking Point for Senate CWA Effort*, INSIDE EPA, Jan. 28, 1994, at 2. Senator Graham's bill deleted the provision authorizing local program general permits, but would eliminate EPA veto over state 404 permits and would require that all funds spent by EPA and the Corps on wetlands regulation within a state be transferred to the state upon federal approval of the state's program. *Id.*; see also *Lack of Local Role in House Wetlands Draft Becomes Key Debate Point*, INSIDE EPA, Oct. 22, 1993 (describing a bill sponsored by Congressman Gerry Studds, Chairman of the House Merchant Marine and Fisheries Committee, that would also not authorize local program general permits).

pragmatic and balanced approach to wetlands regulation, it may serve to prevent some of the more radical attempts to dismantle wetlands regulation from gaining widespread congressional support.<sup>270</sup>

## VII. CONCLUSION

The Clinton wetlands plan will not increase wetlands protection. It eliminated regulatory jurisdiction over 53,000,000 acres of "prior converted croplands,"<sup>271</sup> elevated the wetlands role of the Soil Conservation Service, an agency that has little or no wetlands expertise,<sup>272</sup> promised new "flexibility" in the application of the 404(b) guidelines to small projects,<sup>273</sup> and advocated delegating many more wetlands regulatory responsibilities to states and localities.<sup>274</sup> None of these initiatives are likely to benefit wetlands.

Yet the plan did withdraw some extremely damaging Bush Administration proposals, notably the 1991 wetlands delineation manual<sup>275</sup> and the Alaska "one percent" rule.<sup>276</sup> It also codified the Bush Administration's *Tulloch* rules<sup>277</sup> and promised to do the same concerning the "no net loss" goal.<sup>278</sup> Moreover, the suggested regionalization of nationwide permit 26 may help to curb some of the excesses of that permit, a notorious wetlands destroyer.<sup>279</sup> Not to be overlooked are destructive initiatives the Clinton plan expressly declined to endorse, including nationwide wetlands categorization<sup>280</sup> and compensation for restrictions on wetlands development that do not violate the Constitution.<sup>281</sup>

Ultimately, whether the Clinton wetlands plan is considered therapeutic or destructive is probably a function of two variables:

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270. See, e.g., the Hayes bill, *supra* note 264, which would require a nationwide categorization of wetlands, eliminating all regulation of wetlands in the lowest of three categories and enabling landowners to require the government to purchase wetlands in the highest category (which would be limited to 20% of the wetlands in a county). The Hayes bill would also adopt the proposed 1991 Bush delineation manual, allow Alaska to develop 10% of its wetlands, expand the list of activities exempt from regulation, require federal wetlands permitting to defer to state coastal zone management plans, and eliminate both the § 404(b) guidelines and EPA's veto authority. See Satterfield & McDonald, *supra* note 264, at 8; Howie, *supra* note 267, at 7.

271. See *supra* notes 89-103 and accompanying text.

272. See *supra* notes 104-114 and accompanying text.

273. See *supra* notes 153-159 and accompanying text.

274. See *supra* notes 177-209, 251-56 and accompanying text.

275. See *supra* notes 33-38 and accompanying text.

276. See *supra* notes 39-58, 260-61 and accompanying text.

277. See *supra* notes 59-81 and accompanying text.

278. See *supra* notes 82-88 and accompanying text.

279. See *supra* notes 210-28 and accompanying text.

280. See *supra* notes 257-59 and accompanying text.

281. See *supra* notes 262-66 and accompanying text.



how one views the prospect of a greater role for state and local decision making, and the likely shape of congressional amendments to section 404 of the Clean Water Act. No one can predict the outcome of congressional deliberations, but the economics of wetlands regulation counsel against too strong a role for states or localities.<sup>282</sup> Nevertheless, it seems as if the current political winds are demanding a greater state role.<sup>283</sup> The Clinton Administration is also favorably disposed to watershed planning,<sup>284</sup> giving further impetus to efforts to "defederalize" the 404 program. While watershed plans could help to ensure that the wetlands permit process is sensitive to the cumulative impacts of wetlands fills,<sup>285</sup> state, local, or regional plans cannot serve as a substitute for the permit process. Only a case-by-case analysis can resolve the essential question of whether practicable alternatives exist to proposed activities that do not require destruction of wetlands.<sup>286</sup> If the effect of the Clinton plan is to encourage Congress to displace individual permitting with areawide planning, the nation will surely see the 300,000 acres of wetlands destroyed annually increase in the coming years.

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282. See *supra* notes 179-183 and accompanying text.

283. See *New Senate CWA Bill Expected To Spark Wetlands, Watershed Debates*, INSIDE EPA, Jan. 28, 1994, at 1, 2; See also Jon Kusler, *Wetlands Wish List*, NAT'L WETLANDS NEWSL., Mar.-Apr. 1993, at 11-12 (list of recommendations for amending § 404 of the Clean Water Act by the Association of State Wetlands Managers which resembles, to a remarkable degree, the Clinton wetlands plan); *Governors in Concert*, NAT'L WETLANDS NEWSL., July/Aug. 1992, at 4 (National Governors' Association wetlands policy statement).

284. For example, the Clinton plan for the Pacific Northwest public land forests, *supra* note 4, is heavily premised on watershed planning.

285. See Terence L. Thatcher, *Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act*, 20 ENVTL. L. 611, 640-47 (1990) (illustrating how cumulative impact analysis should affect wetlands permitting).

286. 40 C.F.R. § 230.10(a). See generally Houck, *supra* note 128.